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3
VERMONT, SUPREME COURT
REPORTS 24

OF

CASES

ARGUED AND DETERMINED

SUPREME COURT

OF THE

STATE OF VERMONT.

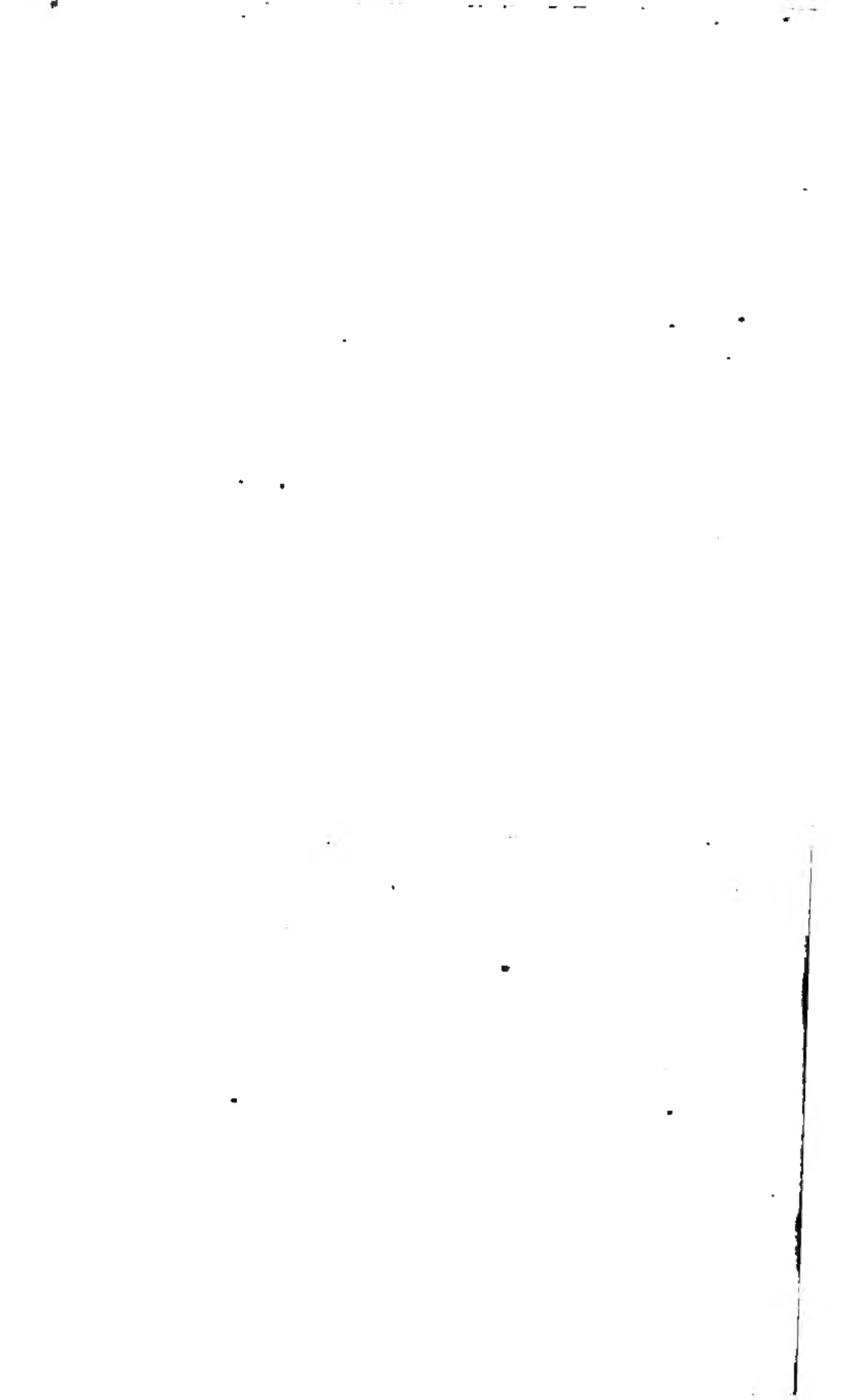
REPORTED BY THE JUDGES OF SAID COURT, AGREEABLY TO A STATUTE
LAW OF THE STATE.

VOL. IV.

ST. ALBANS :

J. SPOONER...PRINTER.

1888.



Justices of the Supreme Court, and ex officio, Chancellors of the Court of Chancery, in the State of Vermont, during the time embraced in these Reports.

For the year commencing in October, 1830, and ending in October, 1831.

TITUS HUTCHINSON,	<i>Chief Justice.</i>	
CHARLES K. WILLIAMS,		} <i>Assistant Justices.</i>
STEPHEN ROYCE, Jun.		
EPHRAIM PADDOCK,		
JOHN C. THOMPSON,*		

For the year commencing in October, 1831, and ending in October, 1832.

TITUS HUTCHINSON,	<i>Chief Justice.</i>	
CHARLES K. WILLIAMS,		} <i>Assistant Justices.</i>
STEPHEN ROYCE, Jun.		
NICHOLAS BAYLIES,		
SAMUEL S. PHELPS,		

**Judge Thompson deceased in June, 1831.*

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ERRATA.

- Page 16—line 21 from top, for 'prevented,' read *permitted*.
 19—line 4 from top, for 'declaring,' read *deciding*.
 30—line 26 from top, expunge 'that.'
 43—line 2 from the top, after statute, in some copies, insert *is*.
 line 11 from top, for 'the to,' in some copies, read *to the*.
 47—bottom line, after 'us,' insert *to*.
 55—line 8 from top, after 'attachment,' insert, *would be obligatory*.
 58—line 24 from bottom, for 'defendants,' read *defendant*.
 60—line 5 from bottom, for 'forms,' read *powers*.
 61—line 13 from bottom, for 'undefined,' read *independent*.
 63—line 15 from bottom, for 'Durkee,' read *Durgee*.
 104—lines 4 and 7 from bottom, for 'plaintiff,' read *plaintiffs*.
 194—line 14 from top, for 'agreeable,' read *agreeably*.
 203—line 21 from top, for 'Windsor,' read *Windham*.
 241—line 22 from top, for 'inscrutable,' read *immutable*.
 242—line 13 from bottom, for 'authorizes,' read *authorize*.
 246—line 5 from bottom, there should be a period after 'itself.'
 279—bottom line, for 'with,' read *without*.
 347—line 17 from bottom for 'that,' read *the*.
 348 line 2 from bottom, for 'award,' read *accord*.
 432 line 2 from bottom, for 'has,' read *had*.
 445 line 7 from bottom, for 'hastily,' read *easily*.
 455 line 20 from top, for 'plead,' read *blend*.
 469 line 18 from top, for 'specially,' in some copies, read *specialty*.
 479 line 15 from bottom, for 'decision,' read *opinion*.
 498 line 18 from top, for 'statutes,' in some copies, read *statute*.
 528 line 16 from bottom, for 'offices,' read *office*.
 529 line 8 from top, for 'Here' read *Hence*.
 606 line 12 from top, for 'party,' in some copies, read *property*.
 636 In the index, the title, *CONSIDERATION*, is misprinted
 '*CONSTITUTION*.'

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT.

BENJAMIN FRY vs. SAMUEL CANFIELD.

BENNINGTON,
February,
1831.

A horse and saddle, owned by a member of a company of cavalry, are not exempt by the militia laws of the state from attachment or execution.

THIS was an action of *trespass* for seizing and carrying away a horse and saddle belonging to the plaintiff. Plea, *not guilty*. At the trial in the county court, the defendant justified the taking of the property in question by virtue of a writ of attachment against the plaintiff in favor of one Jona. B. Morton. The plaintiff contended that the horse and saddle were exempt from attachment and execution by virtue of the militia laws of the state; and he gave evidence tending to prove that he was a member of a company of cavalry; that he was equipped as the law directs; that the horse and saddle were his property, and were kept fitted and used for cavalry review. The defendant gave evidence tending to prove, that the plaintiff, before the attachment, had sold his military equipments; and he proved that the plaintiff, before the attachment, kept and used the said saddle for his common and ordinary use; and also that at the training next before the attachment, the plaintiff was not fully equipped with any article required by law. The court decided that neither a horse nor saddle, kept under such circumstances, were exempt from attachment or execution, and rendered judgment for the defendant.

The plaintiff excepted, &c., and removed the cause to this Court, and moved for a new trial.

BENNINGTON,
February,
1831.

Fry
vs.
Canfield.

After argument, the opinion of the Court was delivered by WILLIAMS, J.—We are to determine in this case whether the property, which is the subject of this action, is exempt from attachment and execution by the 32nd section of the militia act. Those articles which it was thought proper to protect from attachment and execution are enumerated in that section, and it is to be presumed the legislature made every provision upon this subject which the exigency of the military service required. The statute cannot, and ought not to be, extended by construction. The words of the statute are, that every citizen enrolled, and providing himself with a uniform, arms, ammunition, and accoutrements, shall hold the same exempted from all suits, distresses, executions, or sales, for debt, or payment of taxes. By no possibility can it be said that a horse is included in any of these terms. There might be more doubt as to a saddle and bridle, whether they might not be comprised under the term accoutrements, although that term has usually been considered as embracing only dress and military trappings worn about the person, and has been so defined by some of the most approved lexicographers. But in the 10th section of the statute they are spoken of as furniture for the cavalry service, and a person enlisting is required to own and constantly keep a horse and furniture for that service. There is no good reason why we should give the statute the extended construction contended for.

As to most of those articles which a soldier is obliged to provide, they are useful only as military equipments, and there may be some propriety in exempting those articles from seizure which a man is obliged to provide and keep almost constantly for the use of the public. But a horse saddle and bridle are kept for common and ordinary use, and a benefit and profit is derived to the owner from their use. We are of opinion that the articles for which this suit is brought are not by statute free from attachment, and that we ought not to give such a construction to the words used in the statute as we think was not intended, and which we believe the legislature would not adopt if the subject had been directly presented to their consideration.

The judgement of the county court is affirmed.

Hall, for plaintiff.

Robinson, for defendant.

HENRY CLOSSON vs. JAMES STEARNS.

WINTERMAN,
February,
1831.

An endorsement on a promissory note, written and signed with a pencil, is a valid endorsement, and the endorsee can maintain an action thereon against the maker.

Action of *assumpsit* by the endorsee of a promissory note against the maker. At the trial it appeared that the note in question was made payable to Joel Houghton or order, and by him endorsed to the plaintiff. It appeared from an inspection of the note, that the endorsement was made and signed with a lead pencil, and for that reason, the defendant contended, said endorsement was not a valid one : but the court were of opinion that the endorsement was sufficient, and thereupon rendered judgement for the plaintiff. The case was reserved for the opinion of this Court.

After argument,

WILLIAMS, J., *delivered the opinion of the Court.*—The plaintiff sued as endorsee of a promissory note executed by defendant. On producing the note it appeared that the endorsement was made and signed with a lead pencil. Although it may be imprudent and unsafe, in many cases, to rely on a writing made with a pencil, yet the authorities show clearly that such writing has been recognised as legal. The case of *Merritt & Merritt vs. Clason*, 12 *Johns.* 102, and the case of *Clason vs. Bailey & Voorhees*, 14 *Johns.* 484, establish this principle, that a memorandum of a contract made with a lead pencil is a sufficient memorandum in writing within the statute of frauds ; and in the latter case *Chancellor Kent* mentions several cases where the same, or a similar principle, has been decided. In the case of *Rymes vs. Clarkson*, 1 *Phillimore's Reports*, 22, found in *Ingraham's collection* of cases from the English ecclesiastical reports, it was considered that a codicil or a will written in whole, or in part, in pencil was a will in writing agreeable to the statute. In a more recent case, *Geary vs. Physic*, 5 *Barn. and Creswell*, 234, the very point made in this case was raised and discussed ; and it was decided that an endorsement upon a promissory note, written with a pencil, was a valid endorsement within the custom of merchants. We see no reason for disregarding these authorities and establishing a different principle in this state.

The judgement of the county court must, therefore, be affirmed.

Closson, *pro se.*

Roberts & Kellogg, for defendant.

CASES IN THE SUPREME COURT

WINDSOR,
February,
1831.

MAY & WALES vs. EDWARD CORLEW.

When a report of auditors is set aside, and the cause again referred to them, they must go into an examination of the whole case, if requested, and make their report accordingly.

Auditors having made and signed a report may afterwards make an additional statement explanatory of their views in the case; and

They may report in the alternative, leaving it to the court to render judgement for one of two sums according as the court should judge the law to be.

A party to an action on *book account* may testify, before auditors, to a settlement, or to payments and items in his account, from which a settlement may be inferred.

This was an action on *book account*, and the questions in the case arose on objections filed to the report of the auditors. It appears that two auditors had been appointed to examine and adjust the accounts of the parties, and make report thereon at June term, 1830. These auditors met and examined the accounts pursuant to the rule and order of court, and made their report at said term in favor of the plaintiffs. The sum which they found due to the plaintiffs, (\$53,06,) was, as appeared by the report, composed in part of various items of interest in gross sums, and the report did not specify the rule by which it was allowed, nor the time for which interest was computed. For this informality, and for other reasons, the court rejected the report, and the cause was again referred to the same auditors, and to one other, who was added to the board at the request of defendant's counsel, under the following rule and order of court: "County court, June term, 1830. The report in this case, made at this term, being heard, it is ordered by the court that the same be recommitted; and that William Henry be, and he is appointed an additional auditor in said cause. And said auditors are hereby directed to have a hearing as to the settlement in 1819, and report upon the whole case at the next term of this court." Under this rule the auditors re-examined the accounts, and made the following report:

"The account of the plaintiffs, as exhibited to the former auditors, was admitted to be correct in every respect as reported by said auditors,—a copy of which account and the original report of said auditors are herewith returned,—except as to a settlement in 1819, or payments claimed to have been made at that time to make a settlement. The defendant's counsel then offered to prove a settlement in 1819, or the payment of cattle and money at that time to make a settlement. The plaintiffs' counsel contended, that the hearing of the auditors should be strictly confined to the words of the rule, "to have a hearing as to a settlement in 1819," and objected, that the defendant was not a competent wit-

ness to prove said settlement or payments made at that time to make said settlement, and that he could not be examined as to any particular payment or item in his account, or as to any facts from which a settlement might be inferred. The auditors overruled the objection, and admitted the defendant to testify as to payments, and items in his account, from which a settlement might be inferred. During the hearing, the plaintiffs offered James May as a witness, who is agent or clerk for the plaintiffs, to prove that at a certain time after the commencement of this suit the defendant came to him, and after a discussion relative to the suit, took him aside, and offered to settle the account with him provided he would take of the defendant a horse of the value of \$75,00, and the defendant would afterwards pay the balance. The defendant contended that this testimony was improper, and the auditors rejected it.

WINDSOR,
February,
1831.

May et al.
vs.
Corlew.

From the whole examination of the parties, and their proofs, we are of opinion that there was no settlement of accounts between the plaintiffs and defendant in 1819 ; but that there was a payment of \$29,00 at the time of the alleged settlement in September, 1819, which is not allowed in the report of the former auditors in this case, in which report the accounts of the parties are correctly stated, with this exception. We, therefore, report the balance by said report due from the defendant to the plaintiffs

	53,06	
Interest on the same from May 1, 1830	1,63	
	<hr/>	54,69
From which we deduct the payment of	\$29,00	

made 20th Sept. 1819, at the time of the pretended settlement, and the interest from June 14, 1820, this being the time from which the interest on the account commenced—the balance being reckoned from the end of each year, the year ending June 13—

18,21—47,21

Leaving now due from defendant to plaintiffs \$7,48.
And we do report that said sum of \$7,48 is due from the defendant to the plaintiffs to balance book account between them.
Cost of this auditors' court taxed and allowed by us at \$19,25.

Asahael Powers, }
William Henry, } Auditors.

I, William Thayer, one of the auditors in this cause, do not agree with the other two auditors in the above report, and hereby signify my dissent.
Wm. Thayer."

"The auditors aforesaid, do further unanimously agree and report that in case the hon. court shall be of opinion that the auditors erred in point of law, in admitting the defendant to testify, as herein before stated ; or in case the hon. court should be of opinion that it was improper for us, according to the terms of the rule, to allow the said sum of \$29,00, and the interest, \$18,21, as

WINDSOR,
February,
1831.

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Corlew.

part payment of the plaintiffs' account, notwithstanding we are of opinion there was no settlement made in 1819, as contended by the defendant; then we do report, that there is due from the defendant to the plaintiffs, to balance book accounts between them, the sum reported by the former auditors, 53,06
And interest from 1st May, 1830, 1,63

—54,69.

Asahel Powers, }
Wm. Thayer, } Auditors."
William Henry, }

The defendant filed exceptions to the report; but the court rendered judgement thereon for \$54,69 in favor of the plaintiff; and the case was reserved for the opinion of this Court.

Mr. Sargeant, for the defendant.—1. The first exception to this report is, that the second part of it is surplussage—made without authority, they having made and signed one report, and then extrajudicially made another.

2. Their powers had ceased when the first report was signed.

3. The report is in the alternative, leaving it to the court to take their choice or election which to accept.

The court made that election, and accepted the latter. Such a power is not given to the court by any statute, and they never had it by our consent: therefore, it is insisted, that such election and acceptance are error.

If, however, this report may be good in form in the alternative, yet the court erred in point of law; for the auditors, in admitting the defendant to testify as to the settlement of 1819, and the payments made at the time, were correct.—2 *Aikens*, 388, *Fay et al. vs. Green*. The acceptance of this report by the court, rejecting the testimony of the defendant as incompetent to prove a settlement and payment of plaintiffs' account, operates as a surprise to defendant; for had he not supposed the defendant on oath to be competent to prove the above facts, if believed, he the defendant would have produced other testimony to have sustained his defence, to wit, that of settlement and payment. But with this decision accepting the report, by excluding the defendant's testimony as incompetent—to set it right now by further and other testimony, is out of the defendant's power.

Again, the auditors have certified and sent up to the court the facts, in detail, from which they made this report; and the defendant contends that the auditors erred in their conclusions from these facts, that from their schedule of facts it appears perfectly

clear, that there was a legal settlement made between the parties in 1819; and that the Court should so decide now.

WINDSOR,
February,
1831.

Mr. Cobb, contra.—

May et al.
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WILLIAMS, J., after stating the case delivered the opinion of the Court.—Some objections have been made to the form in which this report is made; but it appears to us that these objections are not well founded. The auditors must find all the facts, and cannot refer the decision of any mere question of fact to the Court: but they may submit any question of law to the Court, and for that purpose, they may report in the alternative as they have done in this case. In rendering the judgement which the county court have rendered on this report, they must have decided, on the alternatives submitted to them, either that the auditors had no right to do any thing further than to enquire and decide whether there had been a settlement in 1819, or that they improperly admitted the defendant to testify as stated in their report.

As to the first question, I would remark, that when a report of auditors is made, the court must accept it and render judgement thereon; or they may reject it, and the whole case is then again submitted to the same or another board of auditors, who are to hear the whole case anew, without regard to the former proceedings. If the report is not explicit, or not made as the auditors intended, it may be recommitted to them for amendment or correction, so that it may be made conformable to their intentions; and in this case the parties are not allowed to introduce further testimony, or to have a further hearing. If any other course is taken with a report, or if it is recommitted to hear testimony on a particular fact, it must be by consent of parties. In this case it appears that the first report was not accepted: the case was referred to the same auditors, with the addition of Mr. Henry, and they were to report upon the whole case. It then became the duty of the auditors to go into an examination of the whole case, if requested, and make their report accordingly; for upon the report which they should make, the judgement of the county court was to be rendered. The auditors having found that the sum of twenty nine dollars had been paid by the defendant to the plaintiff, there is no sound reason why it should not be deducted from the account of the plaintiffs. If the county court decided upon the ground that the auditors were confined to a single enquiry, and ought not to have enquired in relation to this payment, their decision was erroneous.

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On the other question, whether the auditors decided correctly in admitting the defendant to testify, we are of opinion that the defendant was properly admitted. There have been a great variety of opinions heretofore, as to what a party might be admitted to testify in an action on book. We are well satisfied with the rules which have been laid down by this Court in the cases which have been before them, viz. that the parties may "testify to every material fact in relation to the account proper to be considered in deciding upon the merits of the respective claims of the parties;" (*Stevens vs. Richards & Truesdale*, 2 Aik. Rep. 81;) that they "may be examined as to the mode and time of payments, and to payments made either in whole or in part."—*Fay et al. vs. Green*, 2 Aik. Rep. 386. The decision in either of the cases last mentioned is sufficiently broad to embrace the present case. There can be no stronger objections urged against the testimony of a party to a settlement than to a payment. If only part of an account is claimed to have been embraced in a settlement the question must be usually determined by auditors, and the parties may both be examined as to that fact; otherwise, the plaintiff might charge the defendant by his own oath with the whole of an account claimed, and the defendant would not be prevented either to call on the plaintiff to testify, or to testify himself, that a part of the account had been paid or embraced in a former settlement. But if our opinion on this question had been otherwise, and if the defendant ought not to have been admitted to prove the settlement, yet the plaintiffs are not injured by the testimony; as the auditors did not find the fact of a settlement proved either by the testimony of the defendant, or by any other testimony. In every point of view the county court ought not to have rendered this judgement on the ground that the auditors erred in admitting the testimony of the defendant.

The judgement of the county court ought to have been rendered for the plaintiffs to recover the sum of seven dollars forty eight cents, only, as reported by the auditors, after deducting the payment made in 1819. The judgement which was for a larger sum must, therefore, be reversed, and this Court will render judgement for the plaintiffs to recover that sum only, unless the plaintiffs elect to have the whole case again submitted to the auditors, which the court will permit if requested.

MILLS OLCOTT vs. SAMUEL HUTCHINS and JOHN B. PICKETT.
In Error.

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When a defendant is out of the state at the time of the service of the writ, the judgement of the court, before which the suit is brought, is conclusive as to the sufficiency of the evidence of notice to him of the pendency of the action, and cannot be re-examined on a writ of error.

When notice is proved, in such case, to the satisfaction of the court, and the defendant does not appear, he cannot afterwards, by writ of error, take advantage of any defect or irregularity of service.

This was a *writ of error* brought to reverse a judgement rendered by the county court in favor of *Hutchins* and *Pickett*, against *Mills Olcott*. It appeared on inspecting the record that *Olcott* resided in Hanover, in the state of New-Hampshire, and that the writ against him had been served by attaching his real estate in the counties of Orange and Caledonia. Copies were regularly left with the town clerk in each of the towns where the property was situated ; but no copy was left with any agent or attorney of said *Olcott*, nor did it appear there was any agent or attorney residing in this state : nor was more than one copy left with either of the said town clerks. The suit was entered at the June term of the Orange county court, 1830 ; and there having been no notice given to *Olcott*, of the pendency of the suit, the cause was continued to the next term, when the plaintiffs' counsel produced and read to the court a letter from *Olcott*, which, in the opinion of the court, proved notice to him of the pendency of the action. The defendant, *Olcott*, was then regularly called, and defaulted, and the damages were assessed at \$350. The errors assigned were, the following : " That it appears by the record, that *Olcott* is not an inhabitant of this state, and did not, at the time of the service of said writ, nor at the time of the rendition of said judgement, reside therein ; but that he at those times resided in the state of New-Hampshire, and was absent from this state, and had not returned within the same, before the time of trial ; that it appears by the record that the action in which the judgement was rendered was commenced at the term of the county court, holden at Chelsea, on the third Tuesday of June, in the year 1830 ; and it not then appearing that *Olcott* was duly notified of the commencement and pendency of the action, the same was by the order of court continued to the then next term of the court, that *Olcott* might be notified ; and it does not appear by said record that the plaintiffs in said action caused personal notice of said suit and continuance to have been given to *Olcott*, according to the statute. And it appears by the record that the plaintiffs in said action, without hav-

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ing given *Olcott* such notice, caused him to be defaulted, and entered up judgement against him on such default for their damages and costs, for the sums in said record mentioned."

It was also urged that the 26th section of the judiciary act requires, that if the person whose estate is attached do not reside within this state, then such copy shall be delivered to his or her tenant, agent, or attorney, if any be known; but if none such be known, the copy, &c., shall be left with the town clerk, &c. The officer's return should state that there was no known agent, tenant, &c., before service, by leaving a copy with the town clerk, will be good. Again, when there is no agent, &c., known, a copy must be left with the town clerk, that is, *for the defendant*.

WILLIAMS, J.—This is a writ of error brought to reverse a judgement rendered at the December term of the county court in this county, in favor of *Hutchins & Pickett* against *Olcott*. On inspecting the record, it appears that *Hutchins & Pickett* commenced their action against *Olcott*, at the June term of the county court, by attaching his real estate; that at that time, he being out of the state, and it not having been made to appear that he had any notice of the service, the action was continued to the December term; that at the December term, notice to him was proved and shown to the court by a letter produced and read in court by the attorney for the plaintiffs in that suit; and thereupon a default was taken, and judgement rendered against *Olcott* for damages and costs. The errors complained of are, that it does not appear that personal notice of the suit was given to him, and that judgement was rendered without such notice.

We are to determine in this case, whether this proceeding was conformable to the statute, or whether there is such an apparent error in the judgement rendered below, that it must be reversed. The fifty-fifth section of the judiciary act provides, that if the party against whom any suit shall be brought, were absent from the state, at the time of commencing such suit, and shall not return within the same before the time of trial, the court shall continue the action to the next term, unless it is made to appear to the court that the defendant had notice of such suit. It then makes it the duty of the plaintiff to cause personal notice of such suit and continuance to be given to the defendant twenty days previous to the next term of the court. And unless it shall appear to the court that the defendant had personal notice of the suit, they are to continue it a further time, and give notice by publication.

A similar provision is made as to suits commenced before a justice of the peace ; but no particular mode or manner is pointed out in which this notice shall be given, nor can we derive any aid in declaring what this notice shall be by reference to any other statute, making provisions in other cases which bear analogy to this. This notice is not that which brings the cause into court. The court have jurisdiction of the cause whenever the writ has been served in any of the ways pointed out by law, and duly returned and entered in court ; but it is a proceeding which must be had, as a preliminary step, which the plaintiff is obliged to take, before he can obtain a judgement, and one which the court must see has been taken before they will render judgement. The notice required must be personal notice to the defendant. It is not required that it should be done by a copy ; and, indeed, this would be impracticable in many cases. We cannot command any officer of another state, to serve a process issuing from the courts of this state. Nor can we recognize any officer except our own ; and we cannot send our own beyond the limits of the state. If they should attempt to serve any writ, or deliver any copy of a writ, or even of a notice from the courts in this state, they incur the hazard in some states of being declared guilty of a high misdemeanor, and being sentenced to the penitentiary. The notice must be in such way that the court shall be satisfied that the party has had previous notice of the suit the requisite time before the sitting of the court. A letter, proved to be in the hand writing of the defendant, may contain full and sufficient evidence that he has had regular notice of the pending of the suit. It must be made to appear to the court that the defendant has had such notice. Of course, they are the judges of the sufficiency of the evidence, for that purpose ; and their judgement must be conclusive as to that. If they are imposed on by false testimony, or if they have admitted proof, which upon a further view should not appear to have been in conformity to the statute, they may and will inquire into it, and set aside the judgement which they may render. But it is not a subject for a writ of error, unless the notice should be a matter of record. The statute does not make it necessary to place this evidence on record or keep it on file. It would be well if this was done in all similar cases ; but if required, it can only be by a rule of court ; and of the propriety of making such a rule they must judge.

In this case, the evidence was satisfactory to the county court, that *Mr. Olcott* had received the required notice ; and it must

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be presumed that they were satisfied it was in conformity to the statute. In favor of the proceedings of all courts of general jurisdiction presumptions are to be made that they are regular. The case of *Hayward vs. Hartshorn*, 3 N. H. Rep. 198, was decided so much on the words of the statute of New-Hampshire that it cannot have any effect on a proceeding under our statute. It was decided in that cause, that the notice to be given of the pendency of a suit, when the defendant was out of the state, should be the same as was to be given when the goods and chattels, &c. of an absent debtor were attached. When such attachment is made, it is provided by their statute that a copy may be left by some officer in the state where the defendant lives, or by some other person, and affidavits thereof made. There is no such provision in our law, and, as has already been remarked, it would be unsafe for any person to execute such a law in some of the states of the union. In this state, when the goods of a person not an inhabitant, are attached, the copy can only be left with his known agent or attorney, or at the place of attaching; and when the real estate of such person is attached, a copy must be left with his tenant, agent or attorney, if any be known; and if not, then a copy left with the town or county clerk is deemed sufficient notice; but in no event is the officer required to deliver or send a copy out of the state. The county court, as we have said, being the proper judges of the evidence to establish the fact of notice; and as it is no where required that the evidence should be placed on the record, it is to be presumed that it was proved to them that the defendant in the court below was notified agreeably to the requirements of the statute; and we cannot discover any error in their proceedings upon this point.

The other question which was mentioned, as to the regularity of the service, should have been taken advantage of by a plea in abatement in the county court, which the defendant could have done if he was duly notified. As the court adjudged, there is no error in the proceedings of the county court, and

The judgement must be affirmed.

Marsh for plaintiff in error.

Burbank for defendants.

JOHN B. PICKETT vs. ERASTUS DOWNER.

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D undertook to remove certain boxes of lumber down a river and deposit them safely in a certain cove; but being prevented by the owner of the cove from depositing them there, he left them in an eddy immediately below the cove, in as safe a place as could be found, fastened by a rope, and paid no further attention to them. The water in the river afterwards arose, in consequence of which the lumber was carried away and lost. It was held, in an action brought by the owner against D, to recover for the lumber so lost, that it was not only the duty of the defendant, under the circumstances of the case, to place the lumber in as safe a place as there was near to said cove, but also to continue a prudent care over the same, until he had given notice to the owner, and until the owner, after such notice, could resume the care and control thereof.

This was an *action on the case*, in which the plaintiff declared against the defendant, that he, the defendant, undertook to take two boxes of lumber from the foot of the upper locks at White river falls, on Connecticut river, and remove the same and deposit them in a certain cove immediately above the lower locks on said falls; and complaining that the defendant so negligently performed the said undertaking, that the said boxes of lumber were carried off down the river, and were broken, injured and lost. There was a second count alleging that the defendant had undertaken to remove said lumber, and *take care of the same*, and that he so negligently did it, it was injured and lost. The defendant pleaded *not guilty*. At the trial of the issue, it appeared in evidence that the defendant had agreed with the plaintiff, (who resided in Bradford, about thirty miles from said locks,) to remove said boxes of lumber, which lay in the river, and deposit them safely in said cove; that he did remove them, but the owner of the cove forbid and prevented the defendant from putting them in the cove; that the defendant thereupon deposited the lumber in an eddy, immediately below said cove, in as safe a place as could be found, and made the same fast with a rope; that it remained there securely ten or twelve days, when it was carried off by a freshet in the river, and broken to pieces and materially injured. The plaintiff introduced evidence tending to show that the cove in question was a safe place of deposit for lumber; that it had always been used by lumbermen at their pleasure, without paying toll, or without being controlled or prevented by the owner; that the defendant lived, at the time when he contracted to remove said lumber, near to said cove, and that for a day or two before said lumber broke away and went down the river, it moved about in the eddy, having fifteen or twenty feet more length of rope than would best secure it from danger; that the defendant being asked who had the care of the lumber, a day or two before it broke loose,

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answered, he had the care of it ; and he was told it would be carried away if not taken care of ; that no further attention was paid to it by the defendant. The defendant requested the court to charge the jury, that if they found the defendant agreed to put the boxes into said cove, yet if they found the owner of the cove had forbidden him from so doing, he was excused therefrom, and that in that case the defendant was only bound to put the boxes in the next most secure place then to be found, and there fasten and secure them as well as he then could ; and that he was not in duty bound to have any further care of them. But the court charged the jury, that if they found the owner of the cove did not prevent or forbid the defendant from putting the lumber into said cove, he had put it elsewhere at his own risk ; that if the defendant found a difficulty by the interference of the owner, which was not contemplated by either plaintiff or defendant when the contract was made, the plaintiff living at a distance, and the defendant near to said cove, it was not only the duty of the defendant to place said lumber in as safe a place as there was, near by, which he was at liberty to use, but also to continue a prudent care over the same in the event of highwater, until he had given notice to the plaintiff that he was so prevented from putting the lumber into said cove, and until the plaintiff could, after such notice, resume the care of said lumber ; and that they could not find the defendant guilty unless they found that the injury occurred through his neglect. The jury returned a verdict for the plaintiff. The defendant filed exceptions, on which the cause was removed to the Supreme Court, on a motion for a new trial.

Mr. Collamer, for defendant.—1. The defendant insists, when he was employed only to remove the lumber to the cove, he cannot, by fortuitous events, not within his control, be visited with any farther or continued duty or risk which he never undertook. He was entitled to complete his services *at that time* ; and if he did what a man of ordinary prudence would have done with his own property *at the time*, it is enough. He had a right to expect, and did expect, the owner immediately to see to it ; and he had never undertaken, nor was he bound by law, to go forty miles to inform the owner, nor could he have recovered pay for so doing.

2. It was the duty of the owner to procure licence from the owner of the cove for their storage and safe keeping *there* ; this he should have previously attended to ; and he cannot, by his own neglect of this duty, visit care, expense and risk on the defen-

dant. The court did, indeed, tell the jury, if the defendant was prevented by the plaintiff, he is excused; but they should have told them this neglect of the plaintiff's providing licence of the owner of the cove, was such a wrong of his that he cannot be permitted to take advantage of it: for in trespass on the case, where the damages are in any measure the result of the plaintiff's neglect, he cannot recover.

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3. The court did, indeed, charge the jury they could not find for the plaintiff, unless the damage was occasioned by the defendant's neglect; yet it must be understood, *neglect* of that which the court had previously said was his duty, and in pointing out which duty the defendant contends there is error.

4. The court say, if the objection to entering the cove was not anticipated by the parties, it created additional duties on the defendant, which could not be then discharged, but visited a *continuing care* on him. The defendant contends that the plaintiff by presuming on the consent of the cove-owner, could not, without notice or agreement, visit any such liabilities on the defendant. Besides, this ought not to have been charged as supporting either count in the declaration; for neither counts on a duty arising from any such contingency.

Smith and Peck, contra.—1. The defendant undertook for a reward to be paid him therefor, to remove and deposit the lumber in the cove; and the act of the owner of the cove does not excuse him from the performance of his contract. The undertaking of the defendant was absolute, and it is his own fault and folly that he did not provide against this event. It must be presumed, that he knew whether the fulfilment of his undertaking was in his power.—1 *Chitt. on Con.* 272; *Cowp.* 784; 3 *B. & P.* 291; 7 *Mass. Rep.* 325, 436; 13 *Mass. Rep.* 94; 3 *M. & S.* 267; *Blight vs. Page*, 2 *B. & P.* 295, n. a.; 3 *Alleyn*, 27; 7 *Mass. Rep.* 331; 6 *Term Rep.* 650, 750; 5 *Vin. abr.* 207; *Roll. abr.* 415, 452; 6 *Term Rep.* 710; 1 *Saund.* 216.

If these authorities are applicable to the case at bar, and it is impossible for the plaintiff's counsel to see why they do not apply with all their force, they are decisive of the question. If then it was the duty of the defendant, under the circumstances of this case, to deposit the lumber in the cove, as he had contracted to do, he is liable in this form of action for a breach of that contract.—1 *Term Rep.* 274; 3 *East. Rep.* 62; 1 *Chitty's Pl.* 133-4; 2 *Strange*, 1192. At all events, the lumber must be regarded

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as in the possession of the defendant, till he gave the plaintiff notice that he could not deposit it at the place agreed upon, and that he had left it at a place not contemplated by the contract, and until the plaintiff could resume the possession of it. The defendant undertakes to deliver property at a particular place, and instead of a delivery at that place, in consequence of an event not anticipated by either party, delivers it at another place without notice to the plaintiff, while he had every reason to suppose the contract fulfilled. The necessity of the case, and the safety of community, would seem to require, that the possession of the carrier should continue until the contract is perfected by a delivery of the property at the place designated, or until notice given to the owner, that he could not fulfil the contract, and he be held liable for any loss in the mean time occasioned by his negligence. Such, no doubt is the law in the case of a common carrier; (4 *Pick.* 371;) and the same reason exists for extending the doctrine to the case of a carrier in a particular instance. In the case of *Ostrander vs. Brown*, (15 *Johns. Rep.* 39,) it was held, that placing goods on the wharf is not a delivery to the consignee so as to discharge the carrier, even though there be an inability or refusal of the consignee to receive them. So if it be the usage of the carrier to deliver goods at the house to which they are directed, he is bound to do so, and to give notice to the consignee.—2 *Wm. Blackstone's Rep.* 916; 2 *Kent's Com.* 469. The principle to be extracted from all the authorities on this subject is, that notice is required to be given to the consignee, that he may take charge of the goods. If notice to the consignee of the delivery of goods is required, is not notice to the owner of a non-delivery at the place designated, and at a place where they would be more exposed, equally, nay more necessary? If we are correct in the position last taken, the only remaining question is, was the lumber lost through the negligence of the defendant? The case was put to the jury expressly on this ground, and they have found the point against the defendant.

WILLIAMS, J.—The jury have found, under the charge of the court, that the injury of which the plaintiff complains, arose from the neglect of the defendant, and the question in the case must arise under the second part of the charge of the court, as to the duty of the defendant, if prevented by the owner of the cove from putting the lumber in the place contemplated by the parties. There has been no dispute as to the first part of the charge, and

indeed there can be none. If the defendant placed the lumber in a place different from the one where he stipulated to place it when there was no lawful excuse for so doing, he was liable for all damages.

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We are well satisfied with the charge given in this case to the jury, as to the duty of the defendant, and are not disposed to decide whether the defendant was bound by his contract at all events to place the lumber in the cove contemplated; but considering that he was prevented by the owner from placing it there, and that this was a contingency not contemplated by either of the parties, at the time of making the contract, and, therefore, not provided for, we think the duty of the defendant was very plain. He could not abandon all care of the property intrusted to his charge; but he became an agent from necessity, and was bound to take prudent care of the property until he had given notice to the owner, and the owner had had sufficient time to make such further provision as he thought proper. By giving this notice he could relieve himself from any further responsibility after a reasonable time had elapsed. And it was his duty to give such notice when by the interference of the owner of the cove he was prevented from placing the property in the situation which the plaintiff directed. The situation of the defendant, under these circumstances, is somewhat similar to that of a master of a vessel when the voyage is interrupted in a foreign port by capture, detention, or unforeseen, or unusual casualties; he then becomes from necessity the agent for the owners, freighters, insurers, and all concerned.—9 *Mass.* 548, *Douglas vs. Moody et. al.* The court did not charge the jury that a neglect to give notice to the owner would make the defendant liable; but that the property remained in his custody until such notice, and that he was bound to take prudent care of the same. The jury have found that there was on the part of the defendant a want of this care, and that in consequence thereof the plaintiff has sustained the injury complained of. The case was certainly put on as favorable ground for the defendant as he was entitled to.

The judgement of the county court must be affirmed.

Smith & Peck, for plaintiff.

Collamer, for defendant.

ORANGE,
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STEPHEN MEADER, surviving partner of William Eames, vs. JAMES SCOTT.

In an action brought by one as surviving partner, to recover for a debt due to the firm, the defendant may plead in offset any demand he has against the plaintiff individually, unless there be some equitable interest in another person which a court of law can protect.

This was an action on *book account*, and was brought before the Court on objections filed to the following report of the auditors made in the cause :

“ Upon hearing the testimony introduced in support of the parties’ claims, the auditors allowed the whole of the plaintiff’s account, excepting one item of \$2,50 for making a coat, which appeared to have been twice charged by mistake. They also allowed the whole of the defendant’s account against the plaintiff at \$25,07, including interest from the 1st of January 1830 ; from which deducting \$8,13, the amount of plaintiff’s account, including interest thereon from the 1st of January, 1828, leaves the sum of \$16,94, which we find and report as the balance due from the plaintiff to the defendant to balance book accounts between them.

The testimony upon which the auditors arrived to the foregoing result was as follows :—it was proved that the last item in defendant’s account against the plaintiff, (\$4,96,) was a *balance due* for boarding persons employed by *Wm. Eames*, in his life time, to work in the shop of *Meader & Eames*, under the articles of partnership between the latter, by which it had been stipulated that *Eames* should pay and board two hands in the shop as an offset to the services and board of *Meader*. It further appeared that, by the agreement between *Eames* and defendant, any work done for the latter in the shop of *Meader & Eames*, was to be applied upon his account for boarding the hands, as aforesaid, and that for the balance due the defendant for board, he was to take his pay in goods out of *Eames*’ store. It also appeared that the whole of the board, of which this item was the balance, accrued before the death of *Eames*, and that *Eames* had accounted with defendant in the settlement of their private accounts for the residue.

The two first items in the defendant’s account, that of \$1,50 for boarding Polly Deming and James Ricker, and that of \$17,25 for boarding Everett, accrued after the death of *Eames*, and the consequent dissolution of the partnership of *Meader & Eames* ; and said items constituted a claim in defendant’s favor against the plaintiff, *Meader*, in his own right, and not as surviving partner of *Eames*. It was admitted, by the defendant, that *Eames*’ estate is insolvent, and that the plaintiff, *Meader*, is, and was, at the time of *Eames*’ death, a bankrupt. It also appeared that by the terms of the partnership between *Meader & Eames*, they were to settle at the end of each half year, and divide the partnership effects, and that there was a settlement the 5th of April, 1827, at

which time *Eames* credited *Meador* on his private book \$143,20, "balance on shop accounts;" and another settlement on the 4th October, 1827, in which *Meador* was also credited on *Eames'* book, with the sum of \$100,83, "by balance on half of *Meador's* shop accounts. It also appeared that the two sums last mentioned were charged by *Meador* to *Eames*, and were among other claims presented by *Meador* for allowance to the commissioners on *Eames'* estate. But it was not proved that the account in favor of the company, against the defendant, upon which this suit was brought, was ever specifically assigned by *Meador* to *Eames* in any of their settlements or divisions of joint property, nor that *Scott*, the defendant, had any notice of any transfer or assignment by *Meador* to *Eames*, of his, (*Meador's*,) interest in said account, before the defendant's account, had accrued against *Meador*. But the account in question was claimed by the administrator of *Eames'* estate, and is prosecuted for the benefit of said estate."

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The county court accepted the report, and rendered judgement thereon, and the case was reserved for the opinion of this Court.

Mattocks and Underwood, for plaintiff.—1. The case finds that the estate of *William Eames*, the deceased partner, is interested in the demand sued to the amount of *one half*. For where partners share in the gain and loss, and no agreement appears regulating the proportion, the law presumes it to be equal.—3 *Kent's Com. p. 6*.

2. In partnerships, the right of action only survives, and not the duty. *Jus accrescendi inter mercatores pro beneficio commercii, locum non habet*. The surviving partner is bound to pay all partnership debts, and is accountable to the representative of the deceased partner for his share of the surplus, after discharging company debts; and for the purposes of paying such debts, collecting company dues, and distributing the surplus, the partnership may be considered as having a limited continuance.—*Watson's Part. 65, 464, 469; Salk. 444; 3 Kent, 13, 14, 31, 32*.

3. Were *Eames* alive, and joined, (as must have been the case,) with *Meador* in this suit, it would not be pretended that the offset could be allowed, as that would be setting off a separate claim of one partner against their joint demand, (debts due partners, being due to all jointly.)—2 *Chit. Blackstone, 304, in notes; 1 do. Pl. 12; Watson Part. 112*.

4. The beneficial interest is the same *after* as *before* the death of the deceased partner; and it is the beneficial interest which the law regards in determining the right of set off.—*Winch vs. Kerby, 1 T. R. 621; Brundridge vs. Whitcomb, Chip. Rep. 180*,

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and cases cited; *Bowen vs. Bennett, et al.* 4 Bing. 423; *Montague*, 27. And it is contended that if the offset could not be allowed, *Meador & Eames* suing jointly, (*Eames'* death making no change in the beneficial interest,) the offset can not be allowed, when *Meador* sues as survivor.

5. The Court will protect the interest of *Eames'* estate in the demand sued in preference to defendant's offset ; (the defendant having given credit to *Meador* alone ;) and in as much as a court of law can not divide the demand sued, to do complete justice, defendant must go into chancery, where a decree can order half the plaintiff's claim to be applied to his offset.—*Haven vs. Hobbs*, 1 *Vt. Rep.* 244 ; *Lampson vs. Fletcher, de.* 176 ; *Watson*, 1 *Title settoff.*

6. The creditor of one of two partners can take in execution the interest only of such partner in the partnership effects, and not the whole.—1 *Swift*, 345 ; *Reed et al vs. Shepherdson*, 2 *Vt. Rep.* 120. But if this offset is allowed, we see no reason why, in principle, the whole partnership effects may not be taken to satisfy the individual debts of one of the partners.

7. In book account the auditors are to audit all accounts between the parties of a similar nature and in the same right.—*Stat.* 143. In this case the debt sued is a debt due the partnership, which, according to the authority cited from *Kent's Com.*, has yet a continuance. The debt sought to be set off, is of a separate, private character, and has no concern with the partnership. The estate of *Eames* is interested in the debt sued, but has nothing to do with the offset. Had the offset been a claim against the firm of *Meador & Eames*, then the auditors would be bound, by the spirit as well as the letter of the statute, to let in the defendant's offset, and audit the accounts.

8. No injustice is done the defendant by disallowing the offset. He gave the credit to *Meador* alone, a bankrupt ; and why should *Eames'* estate suffer for defendant's folly ? If the principle, for which defendant contends, be established, we shall have an anomaly in jurisprudence. *Trust a bankrupt, and compel the man of ability to pay the debt without his own consent.* Besides, great injustice would be done to the estate of *Eames*, which the case finds insolvent. The principle wrenches from *Eames'* estate, that which belongs to its honest creditors, to compensate the folly of defendant in giving credit to a well known bankrupt.

9. The principle for which defendant contends is contrary to policy. What man of capital will hazard his money in partnership,

to encourage the poor man to industry and enterprize, when, the uncertain event of death puts all in jeopardy ?

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Burbank, for defendant.—In this action, had it been prosecuted in the life time of *Eames*, nothing would have been pleaded in offset except company accounts. Still, however, if either had received pay, with the understanding of the company, such payment must have been applied. Upon the death of *Eames* the action survives. *Meador* is suable, and must sue for the collection. The account is legally his, and he is holden in equity to the executor of *Eames*.—*Montague on set-off*, 24, 25, 26 ; *Barn. & Ald.* 29 ; 1 *Chitty*, 11, 12, 13, 37 ; 5 *Term Rep.* 493 ; 3 *do.* 433 ; 6 *do.* 582. In auditing accounts the auditors must settle all accounts in the same legal right.—*Stat.* 143. In this case it appears by the auditors' report that the defendant was to board the workmen in the shop, and take his pay in goods and tailor's work. The deal commenced, and at the death of *Eames*, there was a balance of about two dollars due the firm. *Meador* then continued the business, and continued the board of the workmen, till a payment was made, and this he was bound to do, and *Scott* had a right so to pay it.

WILLIAMS, J., delivered the opinion of the Court.—This was an action on *book account*, brought by the plaintiff as surviving partner of the firm of *Meador & Eames*. The auditors report that there was a sum of eight dollars thirteen cents on the books of *Meador & Eames* against the defendant, which was rightly charged to the defendant ; that the defendant had also an account against *Meador & Eames*, of four dollars and ninety six cents, and also an account of eighteen dollars and seventy five cents against *Meador* alone, which was for boarding certain hands employed by *Meador*, after the death of *Eames*, which left a balance against the plaintiff of sixteen dollars ninety four cents, for which judgment has been rendered against the plaintiff. The legal mutuality of these claims was decided in a similar suit at the last term in the cause of *Meador vs. Leslie*, reported in 2 *Vt. Rep.* 569. The cases of *Slipper vs. Stidstone*, (5 *Term Rep.* 493,) and the case of *French vs. Andrade*, (6 *Term Rep.* 582,) recognise the principle upon which that case was decided, and if there could be any doubt as to the correctness of those cases, this case is not of sufficient importance to induce us to re-examine and overrule them.

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From the right of survivorship *Meador* was legally entitled to all the partnership property. It was his duty to collect the debts due to, and pay the debts due from, the firm. After the debts are paid, he is to pay the representatives of his deceased partner their share. We are not to take notice of his poverty, or to suppose that he will be dishonest. As the right was in him to collect all the demands due to him as survivor, and as it was his duty to pay all debts which *he* has contracted on his own account, the debts due from and to him may be offset if the right of no other is affected. We recognise the rights of both the plaintiff and defendant to have the several demands found by the auditor applied one against the other, unless there is some equitable interest in another which the Court as a court of law can protect; and in this case we can discover no such interest. It does not appear that there are any creditors of the firm of *Meador & Eames* who have any interest: so that this claim against the defendant is not wanted to pay the debts due from the firm. It is not found that this demand was ever assigned to *Eames*: so that the equitable interest is in his representatives. It is true, that the auditors might have inferred that fact from the other facts which they have found; but they have not, and it is not for us to make the inference. And farther, if such was the case no notice of it was given to the defendant, and the Court would not protect the interest of an assignee of a debt when no notice of the assignment had been given to the debtor. It appears farther in the case that by the contract between *Meador & Eames* and the defendant, that the defendant was to pay for whatever work was done by them for him in boarding the hands they employed. The defendant was, therefore, under no obligation to pay this in any other way. It was, therefore, a contract to be performed with the survivor, more especially if he had no notice of any equitable claim in any one else. If the defendant has performed services of the kind stipulated for, and to the amount of the account which the firm of *Meador & Eames* held against him, he has performed his contract literally, and both *Meador* and the representatives of *Eames* should be content. If he has gone farther and made *Meador* his debtor, *Meador* is under a legal and moral obligation to pay the balance, and neither he nor the representatives of *Eames* can complain that judgement should be rendered against him therefor.

The judgement of the county court
must, therefore, be affirmed.

JACOB F. DODGE and ABRAHAM WATERMAN vs. RUFUS KENDALL. WASHINGTON,
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A party cannot complain of surprise, as a ground for a new trial, because a witness was introduced by the adverse party to prove what was directly put in issue by the pleadings.

When a witness, who had become recognised for the prosecution of the suit, is introduced by the plaintiff, and is admitted without objection, the defendant will not afterwards be entitled to a new trial on the ground of the incompetency of the witness. The objection should be taken at the trial, when the witness can be rendered competent by substituting other bail, or be rejected.

A new trial will not be granted for new discovered evidence, unless such evidence make a clear case, and not be merely cumulative, leaving the question still doubtful, and only giving the party a chance before another jury.

The Court must be satisfied that injustice has been done between the parties before a new trial will be granted.

Neither will the Court grant a new trial when it is apparent it will not avail the petitioner.

This was a petition to the Court for a new trial in a cause in which the petitioners were defendants, and the petitionee was plaintiff. The grounds of the application were, 1st. new discovered evidence; 2d. surprise, and 3d. that one of the plaintiff's witnesses in the original suit was incompetent by reason of interest. It appeared the original action was on a jail bond, and that the only issue put to the jury was, whether *Dodge*, the principal debtor, had committed an escape between the 30th day of November, 1819, and the 29th day of May, 1820. To prove this issue one Moses Peck was called as a witness, who testified that he saw *Dodge* in Middlesex, out of the limits, within the times aforesaid. The defendants then offered four witnesses, who testified that said Peck's character for truth and veracity was below par, and he was not to be believed. The petition further stated that the plaintiff, *Kendall*, being unable to support said Peck, called on Mr. Upham, his counsel, (who had become recognised for the prosecution of the suit,) who testified, in substance, that within the time specified in the pleadings, he made a writ in favor of *Dodge*, against a Mr. Dixon, of New-Hampshire; that *Dodge* told him he was going himself to try to secure his debt, and afterwards told him he had been; that Mr. Upham not having been a witness previously in the cause to this point, and the defendants having no notice that he was to be offered as a witness, they were at that time unable to prove the negative. The new evidence, alleged to have been discovered since the trial, tended to show that Mr. Upham must have been mistaken. Harry Richardson testified in an affidavit filed by the petitioner, that he, Richardson, was employed by *Dodge* to secure the debt against Dixon; that he took the writ

WASHINGTON, made by Upham, went, and transacted the whole business ; and
 March, that *Dodge* did not go. The affidavit of Noah Dodge tended to
 1831. prove that *Dodge*, the petitioner, did not go to New Hampshire,
 Dodge et al. but that Harry Richardson went, &c. It appeared by the affida-
 vs. vit of John Howe, that he was one of the jury who tried said cause,
 Kendall. and that the verdict was founded upon the testimony of Mr. Up-
 ham. *Dodge*, one of the petitioners, stated in his affidavit, that
 he did not transact the business testified to by Mr. Upham, that he
 had no recollection of leaving the liberties of the jail yard previous
 to the first day of June, 1820, and that he was surprised by Mr.
 Upham's testimony, &c.

Mr. Merrill, for the petitioner.—As the case stands, it is ob-
 vious that the verdict is wrong ; that injustice has been done.
 The facts stated in the petition and affidavit of Mr. *Dodge*, shew
 that instead of the defendants being guilty of any neglect or laches,
 in not procuring the testimony at the trial, they could not
 have anticipated the testimony of Mr Upham. Mr. Upham, al-
 though he had been a witness at the former trial, did not testify
 in relation to the escape ; but this testimony was reserved for the
 final trial. The defendants, therefore, can say with great truth
 that his testimony was a surprise upon them. Indeed, the nature
 of the case, arising from the pleadings, is such, that it would be
impracticable for the defendants to be prepared with testimony to
 meet such circumstantial evidence as might be in the power of
 the plaintiff to produce. The question was whether *Dodge* es-
 caped between the 30th of November, and the first day of June?
 Now, it is apparent that the defendant could not come prepared
 with evidence to negative an escape every day during that time.
 They discovered that Peck was relied on, and they came pre-
 pared to meet him, &c.; but they had no reason to suppose there
 was other testimony.

As the granting of new trials “ depends on the *legal discretion*
 of the Court, guided by the *nature* and *circumstances* of the partic-
 ular case,” it may be deemed unnecessary to refer to authorities ;
 yet the defendants cannot forbear to remark that this case comes
 clearly within those fundamental rules which have been establish-
 ed upon this subject. “ A general verdict can only be set right by
 a new trial which is no more than having the cause more deliber-
 ately considered by another jury, when there is a *reasonable doubt*,
 or perhaps a *certainty* that justice has not been done.” “ The
 parties may be surprised by a case *falsely made* at the trial, which

they had no reason to expect, and, therefore, could not come prepared to answer."—1 *Sellon*, 482-3. "When a new trial was prayed for on the ground that material evidence had come to the knowledge of the petitioner since the trial, and the petitioner had been in no fault, the court ordered a new trial."—*Inhab. of Stock. vs. West Stock*. 13 *Mass.* 681. "If a material witness testify on the trial who is interested in favor of the party producing him, and the interest be known at the time to the party producing the witness, but not known to the other party, it will be a good cause for a new trial."—*Niles vs. Brackett*, 15 *Mass.* 378.

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It appears from the affidavit of *Dodge*, that Mr. Upham was incompetent on the ground of interest—but this fact was unknown to the defendants until after the trial. "In a suit against C & B, C was present at the trial, but did know that F, who was a witness at the trial, *knew of other material facts*. But B, who was not present at the trial, knew before trial that F knew said facts; yet a new trial was granted."—*Jackson vs. Laird*, 8 *Johns. Rep.* 469; (*Johns. Dig.* 347.) In *Blake vs. Howe*, (1 *Aikens*, 310,) the Court say, "Now the defendant ought not only to shew a surprise, but that he can make an equitable defence to the action." In the present case, both these points are clearly proved. So careful has the Supreme Court in this state been to prevent any injury to parties by *surprise*, that in *Starkweather vs. Loomis*, (2 *Vt. Rep.* 573,) the court say they "will grant a new trial as for surprise, when the evidence has been excluded, which was offered in reliance upon a reported case."

Upham and Keith, for petitionee.—1. The petitioners, we insist, upon their own proof, are not entitled to a *new trial*. The books inform us that a new trial is usually granted for some erroneous decision made upon the trial, such as the admission of improper evidence, the rejection of proper evidence, or the mis-direction of the judge to the jury. It is, however, sometimes granted upon the discovery of *new* and *material* evidence since the trial; but it must be such as the party could not with diligence have discovered before the trial. New trials are never granted for the default, omission, or negligence, of the parties, their counsel, or attorneys, in not discovering and coming prepared with all the evidence in their power. If it has been made to appear that the *newly* discovered evidence might with proper diligence have been discovered and produced at the former trial, a new trial will be refused; for diligence is said to be the life of the law. *Vigilan-*

WASHINGTON, *tibus et non dormientibus jura subveniunt.*—*Vide* 2 *Tidd's*
 March, 1831. *Prae.* 816 ; 1 *Sw. D.* 787 ; 1 *T. R.* 84 ; 2 *Ib.* 113 ; 2 *Salk.*

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644 ; 6 *Mod.* 22 ; 1 *Bl. R.* 298 ; 2 *Ab.* 802 ; 3 *Caines's R.* 307 ; *Peake's Ev.* 194 ; 1 *Mass.* 237. The new discovered evidence presented by the petitioners, tends only to show that Jacob F. Dodge did not at one time go to New-Hampshire after Dickson, but procured Harry Richardson to go : this does not contradict the testimony of Mr. Upham ; for Dodge might have gone at another time.

2. The testimony of the petitioners, that they did not know that Mr. Upham was recognised to the defendants for costs, cannot avail them upon their petition for a new trial. 1. Because, Mr. Upham was their witness. 2. Because, we say, they knew the fact at the time of trial.

3. Courts will not grant new trials when substantial justice has been done by the verdict ; nor unless the petitioners show sufficient new evidence to convince the Court that a jury would give a different verdict.—*Cogswell vs. Brown*, 1 *Mass.* 237 ; 2 *Salk.* 644.

4. When the evidence offered is merely cumulative the Courts will not grant a new trial.—1 *Sw. Dig.* 787.

5. When the testimony goes merely to impeach the credit of a former witness, a new trial will be denied.—*Halsey vs. Watson*, 1 *Caines's T. R.* 24 ; *Bunn vs. Hoyt*, 3 *J. R.* 255 ; 4 *Ib.* 425 ; 5 *Ib.* 248. Where a party, after the trial of a cause, comes to the knowledge of facts, which would have had a tendency merely to discredit a material witness of the adverse party, it is no good cause for a new trial.—*Commonwealth vs. Drew*, 4 *Mass.* 391 ; *Same vs. Waite*, 5 *Ib.* 261 ; *Hammond vs. Wadhams*, *Ib.* 353 ; *Jackson vs. Kinney*, 14 *J. R.* 186.

6. The escape was a fact for the jury to find ; and the jury having found that fact, we cannot believe that this Court will interfere with their prerogative, unless they are furnished with conclusive evidence, that the fact of the escape did not exist. Every application for a new trial is addressed to the sound discretion of the Court ; and in granting or refusing of which the Court exercise a discretionary power, according to the exigency of the case, upon principles of substantial justice and equity.—*Stark. Ev.* 435 ; *Myers vs. Brownell*, 2 *Aikens's R.* 407-9.

WILLIAMS, J.—On this petition for a new trial in a case where-
 in Kendall was plaintiff and Dodge & Waterman defendants,

these grounds are urged as a reason for granting the prayer of the petition. First, Surprise; Second, That one of the witnesses called on by the plaintiff was incompetent from interest; and Third, New discovered evidence.

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It appears that on the trial the issue joined between the parties was, whether *Dodge* had left the liberties of the jail yard between the 30th November, 1819, and 29th May, 1820, he having obtained an act of suspension at the session of the legislature in 1819. It appears that the fact of the escape was sworn to directly by one *Peck*, whose general character was impeached; that *Mr. Upham* was then called, who swore to a transaction between him and *Dodge*, and a conversation also in relation to that transaction, which tended to show an escape by *Dodge*, at a different time from that testified to by *Peck*, but within the issue. The surprise complained of was in the testimony of *Mr. Upham*. He was the witness who it is said was incompetent, he having been recognised for the prosecution of the suit in favor of *Kendall*, against these petitioners; and the new discovered testimony is to shew that he was mistaken. There are many reasons why the prayer of this petition cannot be granted. The parties must have come prepared to meet the question presented by the issue, and cannot complain of surprise because a witness was introduced directly to prove that which was directly put in issue. It does not appear that any request was made to the court to postpone the trial after *Mr. Upham* had testified. The petitioners took their chance for a verdict upon the testimony as offered.

2. The interest of *Mr. Upham* appeared from the writ, which was then present, or from the records; and the objection should have been taken at the trial when the witness might have been rendered competent by substituting other bail, or would have been rejected.

3. As to new discovered evidence, the general rules in relation to granting new trials for this cause, have been repeatedly settled, and among others, that it must make a clear case, and not be merely cumulative, leaving the question still doubtful, and only giving the party a chance before another jury. *Mr. Upham's* testimony was to a conversation between him and *Dodge*, and the new discovered evidence tends to show that the impression which *Mr. Upham* had from that conversation, was incorrect.

But if *Upham's* testimony was entirely laid aside, we cannot say from the case, as it now appears, that the verdict would have been the other way. The testimony of *Peck* was direct and positive;

WASHINGTON and though he was impeached as to his general character, he might still gain belief. He is not even contradicted by any testimony or affidavits here produced. His testimony, in connexion with the fact, that the act of suspension was passed in November, 1819, when there was no doubt of the validity of such acts, and the improbability of *Dodge's* remaining in the limits when he supposed he was under no legal obligation so to do, would be very likely to prove the issue on another trial. Further; we must be satisfied that injustice has been done between the parties before we should grant a new trial. It is not pretended but that the condition of the jail bond has been broken. The only question is whether it has been done within the time specified in the plea. We should not be disposed to grant a new trial merely to litigate that point if we had reason to believe that by an alteration of the pleadings the plaintiff would be entitled to recover. Furthermore; in neither of the affidavits of *Dodge* which have been filed does he either deny the fact of his having broken the bonds, or of his having broken them within the time stated in the pleadings. If he had remained within the limits for so long a time, he must have been certain of that fact, or, at least, he could have sworn to his belief of it. On the contrary, he only swears that he does not know how long after the act of suspension was passed before he left the limits; nor can he certainly say whether he left them before the first day of June. It is further uncertain, from the affidavits, by whom Mr. Upham was called as a witness, whether by plaintiff or defendant. There is no sufficient reason for granting the new trial in this case.

The petition must, therefore, be dismissed with cost.

ELIAS BROWN vs. THOMAS STORM.

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H having contracted to purchase a lot of land of S, executed his notes to S for the amount of the purchase money, and S obligated himself by bond to convey the land to H on payment of the notes. H entered and took possession of the land, but did not pay the notes; and consequently S did not execute a deed of the premises to H. After H had remained in possession of the land several years he sold his interest therein to D, who, two or three years after, sold and conveyed his interest in the land to B. S having afterwards recovered a judgement against B in an action of ejectment for the seizin and possession of the premises, B filed a declaration for betterments under the statute; and it was held, that B might recover for all the betterments made by himself, and for those made by D, his grantor, provided D, at the time he purchased of H, supposed he purchased a title in fee, and did not purchase H's right, merely, under the contract made with S; and that B could not recover for any improvements made by H, there being no failure on the part of S to fulfil the contract.

No recovery can be had in a declaration for betterments founded on an alleged want of title in the defendant, (the recovering party in ejectment.)

The statute which authorizes the defendant in ejectment to file a declaration for betterments, is not unconstitutional.

This was a declaration for *betterments*, containing four counts. The first was as follows: "Whereas the said *Storm*, in his action of ejectment against the said *Brown*, has recovered final judgement in said action for the seizin and possession of the 2d division lot drawn to the right of Jonas Conist, original proprietor, being lot no. 12, in the 12th range of lots in Berlin, in said county; nominal damages of one cent, and his costs. And now within forty eight hours next after the rendition of said judgement, the said *Brown* comes here into court, and, according to the statute in such case made and provided, files his declaration in an action of the case against the said *Storm*, on the 5th day of June, (said judgement having been rendered on the 4th day of said month,) for this, that William Dewey of said Berlin did, on the 18th day of October, A. D. 1820, for the consideration of five hundred dollars, paid him by the said *Brown*, by his deed under his hand and seal of that date, and duly witnessed, and delivered, and acknowledged by said Dewey, give, grant, bargain, sell and confirm unto the said *Brown*, his heirs and assigns, said lot of land forever. To have and to hold said granted premises, with all the privileges and appurtenances thereof to the said *Brown*, his heirs and assigns, to his and their own use forever. Which said deed the said *Brown* brings here into court ready to be shown. And afterwards, to wit, then and there, the said *Brown*, being purchaser of said lot of the said Dewey, in fee as aforesaid, and supposing his title to be good, entered upon said lot of land, and ever since has possessed and occupied the same, claiming in fee, and has made large and valuable improvements upon said lot, by clearing and fencing the land, and erecting buildings thereon; all of the value of a large sum of money, to wit, the sum of five hundred dollars: and by said improvements said land is made better than it otherwise would have been, a large sum of money, to wit, the sum of five

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hundred dollars. By reason of the premises the said *Storm* became, and is, liable to pay the said *Brown* as much money on demand as said land is made better by said improvements ; and in consideration thereof, after the rendition of said judgement, the said *Storm*, at said Berlin, on the fourth day of said June, promised to pay the same to the said *Brown* on demand."

The second count was similar to the first, except that it alleged *Brown*, and those under whom he claimed to hold, had made large and valuable improvements &c. ; and claimed a right to recover for the whole.

The third count was as follows : " And for this also, that whereas the said *Storm* has recovered a final judgement in ejectment as aforesaid ; and the said *Brown* became purchaser of said lot of land, as aforesaid ; and supposing his title to be good in fee, and not knowing to the contrary, entered upon said lot, and has possessed, and occupied the same, claiming title to it in fee simple, as aforesaid. And the said *Brown* avers, that on the 18th day of May, 1809, the said *Storm* professed to be the legal owner of said lot of land, and then at said Berlin the said *Storm* contracted to sell said lot to one Gersham Harvill, who then and there contracted with said *Storm* to purchase the same, and therefor to pay Jonathan Ayers, the acting agent of said *Storm*, and one Abel Knapp, the following sums ; that is to say, one hundred and fifty dollars in cash, and three other sums of sixteen dollars and sixty seven cents each, payable in wheat, as by the promissory notes in writing of that date, executed by the said Harvill to the said Ayers and Knapp, will more fully appear. And then and there the said *Storm* by his agent, aforesaid, promised the said Harvill that the said *Storm* was the legal owner of said lot, and had good right to convey the same in fee, and that the said *Storm* by a limited time would by deed in writing convey to said Harvill a good and valid title to said lot. And the said Ayers and Knapp then and there executed their bond in writing, under their hands and seals, to the said Harvill, that said *Storm* should and would convey to him said lot as aforesaid. And under this contract the said Harvill, afterwards, to wit, then and there, entered and took possession of said lot as purchaser of said *Storm*. And the said *Brown* avers that the non-fulfilment of said contract was on the part of the said *Storm* in this, that the said *Storm* was not then, and since never has been, the legal owner of said lot, (unless he has acquired a title by the statute of limitations ;) that then, and during the possession of said Harvill, the said *Storm* had no right to convey said lot in fee to the said Harvill : and the said Harvill, having ascertained these facts, neglected to fulfil the contract on his part, denied the title of the said *Storm*, and utterly refused to receive a deed from him of said lot, or to consider himself in possession of said lot under said *Storm*, to wit, at said Berlin, ever after the year aforesaid, while the said Harvill was in possession of said

lot; which possession of said Harvill commenced on the day WASHINGTON
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1831. aforesaid, and terminated on the 3d day of June, A. D. 1817, when the said Harvill deeded said lot to Gersham Heaton and William Dewey; and then and there said Heaton and Dewey took possession of said lot, and continued the possession until the said Heaton deeded his undivided half of said lot to the said Dewey; and after that the said Dewey continued the possession of said lot until he deeded to the said *Brown*, as aforesaid, who then and there entered, and has held possession of said lot ever since. And the said *Brown* avers that when the said Harvill took possession of said lot, as aforesaid, it was in its natural state; that the said Harvill, the said Heaton and Dewey, the said Dewey, and the said *Brown*, have, during their connected possessions, made large and valuable improvements on said lot by clearing and fencing fifty acres of land, by setting out fruit trees, by tilling and manuring the land, by building a dwelling house, barn, and other buildings, on said land, all of great value, to wit, of the value of eight hundred dollars, of which the said *Storm* has had due notice; and by said improvements said land is made *better* than otherwise it would have been, a large sum of money, to wit, the sum of eight hundred dollars; and by reason of the premises, the said *Storm* became, and is, liable to pay the said *Brown* for said betterments; and in consideration," &c.

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Fourth count. And for this also, that on the 18th day of May 1809 the said *Storm* falsely declared he was the legal owner of said lot of land, and had good right to sell the same; and the said Harvill, not knowing to the contrary, then and there contracted with said *Storm* to purchase of him said lot for a price then and there agreed upon by the parties; and at a day then future, the said *Storm* agreed to execute a deed to the said Harvill, thereby conveying to him, the said *Storm's* title to said lot; which title was represented to be good and valid. And the said Harvill not knowing to the contrary took possession of said lot as purchaser under said contract, expecting to fulfil the same on his part, but never did, because he ascertained, that the said *Storm* was not the legal owner of said lot of land, and had no right to sell the same, and could not fulfil the contract on his part. After the said Harvill entered as aforesaid, he continued to possess said lot, and make improvements thereon, until he deeded said lot as hereafter mentioned. In 1812, he refused to receive a deed of said lot from the said *Storm* lodged in the hands of Abel Knapp Esq. as agent for said *Storm*, to deliver to the said Harvill, who then made known to said Knapp he would not take said deed, denied the title of the said *Storm*, and declared he would hold adversely to him. On the 3d of June, 1817, the said Harvill deeded said lot to Gersham Heaton and Wm. Dewey, who then entered and possessed said lot till the said Heaton deeded an undivided moiety of said lot to the said Dewey; and the said Dewey continued to hold to the 10th of October 1820, claiming in fee adversely to said

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Storm, when the said Dewey, for the consideration of five hundred dollars, expressed by his deed under his hand and seal of that date, duly witnessed, declared, acknowledged and recorded, and ready in court to be shown, did give grant, bargain, sell and confirm unto the said *Brown*, his heirs and assigns, said lot of land for ever. To have and to hold said granted premises with all the privileges and appurtenances thereof, to the said *Brown*, his heirs and assigns, to his and their own use forever. And then and there the said *Brown*, supposing he had a title in fee to said lot by virtue of said deed, entered and took possession of said lot, claiming the same in fee adversely to the said *Storm*. And the said *Brown* avers that when the said Harvill first took possession of said lot as aforesaid, it was wild uncultivated land; and the said Harvill, the said Heaton and Dewey, the said Dewey, and the said *Brown*, have during their connected possessions made large and valuable improvements on said lot, by clearing, fencing, tilling and manuring the land, and by building a dwelling house, barn, and other buildings thereon, of great value, to wit, to the value of eight hundred dollars; and by said improvements said land is made better than otherwise it would have been, a large sum of money, to wit, the sum last aforesaid; and by reason of the premises the said Storm became and is liable," &c.

Defendant's plea.—"And now the said *Thomas* comes into court, defends &c., when &c., and for plea saith, that the said *Elias Brown* ought not to sustain his action against him, but ought to be precluded from the same; because the said *Thomas* saith that on the 18th day of May, 1809, and a long time before, he claimed the said lot of land mentioned in said counts, by virtue of a deed from Jonas Coniff, the original proprietor of the right of which said lot is part, dated 10th day of June, 1790—and did on said 18th day of May, A. D. 1809, aforesaid, at said Berlin, by his agent, Jonathan Ayres, sell said lot of land to Gersham Harvill, then of said Berlin, and executed and delivered to said Harvill a bond for a deed of the same; and said Harvill then and the recontracted with, and purchased said lot of land of, said *Storm*, and then and there executed his four promissory notes for the purchase thereof, amounting in the whole to two hundred dollars: the whole of which sums fell due and payable to said *Storm* at different times, but all within four years next after said purchase of said lot; which said deed to be executed to said Harvill on his payment, or securing the payment of said notes. And the said Harvill on said 18th day of May, A. D. 1809, at said Berlin, entered into and took possession of said lot of land under and by virtue of said contract and purchase thereof, and occupied and improved the same until the third day of June A. D. 1817, when said Harvill sold and conveyed his said right and interest therein, and to the crops then growing thereon, to William Dewey and Gersham Heaton of said Berlin, who then and there entered and took possession of said lot of land under and by virtue of said sale from said

Harvill, and occupied and improved said lot until the 29th day of March, A. D. 1820, when said Heaton conveyed all his right therein to said Dewey, who thereby became sole possessor thereof, and continued his said possession and occupancy until the 10th day of October, A. D. 1820, when said Dewey sold and conveyed, by deed of warranty, his right, title, and interest in said lot to said *Elias*, who then and there entered and took possession of said lot under and by virtue of said contract and sale from said Dewey, as aforesaid, and hath ever since possessed and occupied said lot of land under and by virtue of the same; which is the same purchase by said *Brown* as mentioned in the several counts in said *Brown's* declaration. And said *Storm* saith, that said notes still remain in his hands and possession, in no part paid or satisfied. And the said *Storm* avers that he recovered his final judgement in said action of ejectment, mentioned in said *Brown's* declaration, by proving on the trial of said action that said *Brown* held and occupied said lot of land under him, said *Storm*, by virtue of his said contract and sale thereof to said Harvill, as aforesaid. And the said *Storm* avers that he hath at all times hitherto been ready to fulfil and perform the said contract made with the said Harvill, as aforesaid, on his part to be performed and fulfilled. And so the said *Storm* saith, that the said *Brown* got possession of said lot of land by virtue of said contract aforesaid, made between the said Harvill and the said *Storm*, as aforesaid. All which the said *Storm* is ready to verify. Wherefore he prays judgement, if, from having and maintaining his said action thereof against him, the said *Elias* ought not to be barred.

And for further plea in this behalf, by leave of court first had and obtained, the said *Storm* saith the said *Elias* ought to be barred, because he saith, at the time the said *Storm* sold said lot to said Harvill, and said Harvill purchased the same and took possession thereof, as set forth in said declaration, there was not any law of this state authorizing a person then taking possession of land, to file any declaration in manner and form as said *Elias* has filed his declaration aforesaid, and this he is ready to verify: wherefore he prays said *Elias* may be barred of his suit aforesaid."

Plaintiff's replication.—"And the said *Brown*, protesting that said *Storm* had no title to said lot by deed or otherwise, when he put the said Harvill into possession, for replication to the said *Storm's* two pleas in bar, above pleaded, says, that said pleas and matters therein contained are insufficient in the law to bar the plaintiff from having or maintaining his said action for the betterments made on said lot, and that by the law of the land he is not bound to make any answer thereunto. And for special causes of demurrer, the said *Brown* sets down the following: That neither of said pleas can have any application or bearing upon the two first counts in the plaintiff's declaration, who, by the first

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section of the act in such case made and provided, is entitled to recover pay for his betterments made on said lot; that the first plea sets forth a different contract made with Gersham Harvill, to sell him said lot, from the contract described in the 3rd or 4th count of the plaintiff's declaration; and does not traverse or deny, or in any way avoid the contract, described in the 3rd or 4th count, made with the said Harvill for the sale of said lot; nor does said first plea deny, that the *nonfulfilment* of said contract described in the 3d and 4th counts of the plaintiff's declaration, was on the part of said Storm, and therefore the plaintiff is entitled not only to his own, but also to said Harvill's betterments made on said lot;—that said pleas are argumentative; they do not show that said Storm ever had *any title* to said lot during the possession of said Harvill, although said Storm might have had colour of title, and nothing else;—that there is no material fact set forth in said pleas which deserves notice, or an answer: if the whole story should be traversed and tried, it would not decide the merits of the case, but be a *mistrial*. All which the plaintiff is ready to verify; wherefore he prays judgement, whether from having and maintaining his said action he ought to be barred, and for his damages and costs."

Defendant joined in demurrer.

The county court rendered judgement for the defendant, and the case was brought by appeal to this Court.

After argument by *Baylies* for the plaintiff, and *Loomis* for the defendant,

WILLIAMS J., delivered the opinion of the court.—Mr. Storm having recovered in an action of ejectment against *Brown*, the latter has filed this declaration for betterments under the statute. The declaration consists of four counts; the plea professes to answer the whole declaration, and is demurred to. It would have been more advisable to have traversed the declaration, as the statute provides that if judgement is rendered for the defendant on demurrer, the plaintiff may file a new declaration within twenty-four hours. All the questions which have been made would have been raised on the trial of an issue to the jury. But as every question upon which the parties would request the opinion of the Court have probably been made in this case, we are disposed to decide it on the construction which must be given to the statute rather than on any critical view of the pleadings.

The statute was made for the purpose of giving relief in those cases where a person has honestly and innocently entered into the possession of land supposing his title was good, but which proves

to have been defective. The action for *betterments*, as they are termed in the statute, given on the supposition that the legal title is found to be in the plaintiff in ejectment, and is intended to secure to the defendant the fruit of his labour, and to the plaintiff all that he is justly entitled to, which is his land in as good a situation as it would have been if no labour had been bestowed thereon. The statute is highly equitable in all its provisions, and would do exact justice if the value either of the improvements or land was always correctly estimated. The principles on which it is founded are taken from the civil law where ample provision was made for reimbursing to the *bona fide* possessor the expense of his improvements, if he was removed from his possession by the legal owner. It gives to the possessor, not the expense which he has laid out on the land, but the amount which he has increased the value of the land by his *betterments* thereon; or, in other words, the difference between the value of the land, as it is when the owner recovers it, and the value, if no improvement had been made. If the owner take the land together with the improvements at the advanced value which it has from the labour of the possessor, what can be more just than that he should pay the difference. But if he is unwilling to pay this difference, by giving a deed as the statute provides, he receives the value as it would have been if nothing had been done thereon. The only objection which can be made is, that it is sometimes compelling the owner to sell when he may have been content with the property in its natural state. But this when weighed against the loss to the *bona fide* possessor, and against the injustice of depriving him of the fruits of his labour, and giving it to another, who by his negligence, in not sooner enforcing his claim, has in some measure contributed to the mistake under which he has laboured, is not entitled to very great consideration.

The statute gives the right to those defendants in the actual possession and improvement of land, who had purchased, supposing at the time of such purchase, the title to be good in fee. Without the fifth section of the statute, no person, entering into land under a contract with the owner, could recover for his improvements, for no such person could suppose they purchased a title in fee, when the purchase was to depend on fulfilling the contract made with the owner. To this effect were the decisions in the 6th and 12th *Massachusetts Reports*, referred to in the argument.* The fifth section, however, expressly provides, that such person shall

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* 6 Mass. Rep. 307, 331; 12 do. 329.

WASHINGTON **not recover for his betterments unless, in case of a mutual contract,**
 March, **the failure to fulfil was on the part of the owner. And in that case**
 1831. **it gives to the person in possession under such contract the same**
 Brown **right to recover for his improvements as if he had entered under a**
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 Storm

The possession of a person under a contract, or as tenant, may become adverse to the person with whom he contracted, or to the landlord, by *an express disclaimer*. And when he makes such disclaimer, and denies to hold under his contract, or as tenant, and gives notice thereof to the owner, he then becomes a trespasser, and his possession is considered thereafter adverse.—*Blight's lessee vs. Rochester*, 7 *Wheat. Rep.* 535; *Willison vs. Watkins*, 3 *Peters's Rep.* 43. And although such person would be excluded from the benefit of the betterment act, by the express words of the fifth section, yet his grantee would be entitled to the full benefit of it, to recover for any improvements which he might make, especially if the relation between the owner and first possessor did not appear on record. For if it is true that such possession, continued for a sufficient length of time, would protect the person in possession, and give him a title by the statute of limitations, as is considered in the cases above referred to, *a fortiori*, it ought to entitle him, if he entered under a deed which he had reason to suppose conveyed a title in fee, to the value of his improvements.

From the statute which we have been considering the following principles are derived as applicable to the case under consideration: That in order to entitle a person to his betterments he must have entered into possession supposing that he had purchased a title in fee—That no person who enters into possession under a contract with the owner comes within the first section of the statute, and is expressly excluded from the benefit of the same by the fifth section, and, therefore, cannot recover any thing for his betterments unless the owner fails to fulfil the contract on his part—That when a person does enter into possession under a supposed title he is not prevented from recovering pay for the betterments or improvements which he makes, because the person from whom he purchased had made a contract with the owner, unless he had knowledge of such contract, and purchased the right which his grantor had by virtue thereof. This will preclude a recovery in all cases where a person purchases of a mortgagee or lessee, when the relation appears of record, and, in general, in all cases where possession is taken under another by a recognition of his title, as no such person can suppose he purchased a title in fee—That in

a declaration for betterments the title of the plaintiff in ejectment cannot again be brought in question, as that is determined in that action. And from these principles it results, that *Brown* may recover for all the betterments made by himself ;—that he may also recover for the betterments made by Dewey, who deeded to him, if Dewey, at the time he purchased of Harvill, supposed he purchased a title in fee : but if Dewey only purchased of Harvill his right under the contract which Harvill made with *Storm*, *Brown* cannot recover for those improvements ;—and that *Brown* cannot recover for any improvements made by Harvill, as he entered under a contract with *Storm*, and there was no failure on the part of *Storm* to fulfil.

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The declaration contains counts against which there is no objection, which will entitle the plaintiff to a judgement ; but in assessing the damages, none can be assessed on those counts which are founded on the alleged want of title in *Storm*.

The second plea was probably designed to being in question the constitutionality of the betterment act ; but this question was not argued. It is true, all these acts are retrospective ; but I know of no objection against retrospective acts under the constitution of this state, or the United States. The obligation of the contract with *Storm* is not impaired, as the plaintiff can still enforce it against Harvill, if he can give the title which he contracted to give.

The judgement of the court is, that

The plea is insufficient, and that
the plaintiff recover his damages.

ARTIMAS B. LARABEE vs. DANIEL OVIT.

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L purchased a horse of O, and delivered him a note against a third person in part payment therefor. At the same time it was agreed by the parties, that if L did not within a certain time procure good security for the balance, he was to return the horse, and the note was to become the property of O. L having failed to procure the required security, he returned the horse, and demanded the note, which O declined delivering up at the time, but afterwards told L he might have the note if he, L, would come after it, but said he should sue L for damages. L afterwards again demanded the note, and O refusing to deliver it to him, L brought an action of *assumpsit* against O to recover the amount of the note; and it was held, that by the contract the note had legally become the property of O, and that the after promise to re-deliver the note was made without consideration, and did not amount to a rescinding of the contract.

This was an action of *assumpsit*, and the declaration contained three counts. The first was a special one founded on an alleged

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promise by defendant to deliver to the plaintiff a certain promissory note which the defendant had received under the circumstances hereinafter mentioned. The second count was for money had and received, and the third for goods, wares and merchandise, sold and delivered. The cause had been referred to a referee, who afterwards made the following report :

“It appeared in evidence, that in December, 1827, it was agreed between the parties, that the plaintiff should buy of defendant a certain horse at the price of \$55, and deliver to him a note against a third person, amounting to about \$13, in part payment therefor, and that if plaintiff did not within a certain number of days procure good security for the balance, he was to return the horse to defendant, and the note was to be forfeited and become the property of the defendant. In pursuance of this agreement the plaintiff received the horse of defendant, and delivered him the note in question. The plaintiff failed to procure the security required by the contract, and within a few days after the expiration of the time limited by the agreement, he sent back the horse to the defendant, and demanded that the note should be redelivered to him. It did not appear that defendant made any objection to receiving back the horse, but told the agent, whom plaintiff had sent with the horse, that he should not give up the note, unless plaintiff would pay him five dollars, which he said was as much as the note was worth. After some altercation between plaintiff's agent and defendant, the defendant told him plaintiff might have the note if he would come after it, but that he should sue him for damages. Defendant received the horse. This took place at some distance from defendant's house, and he said he had not the note with him. On the next day in the forenoon the plaintiff called on the defendant, and demanded said note. The defendant said he had not the note with him, but said if plaintiff would stay till night and would go to his house with him, he would give him the note ; but threatened to sue plaintiff for damages. The defendant at the time was at work at some distance from his house. The plaintiff refused to wait and go to defendant's house, but insisted on having the note immediately. Several months afterwards, and previous to the commencement of the action, the plaintiff called at defendant's house, and demanded the note of the defendant, who refused to deliver it to him. It appeared that previous to this time the defendant had disposed of the note, and had not gotten it in his possession. The note in question was not negotiable, and was not payable in money.

If the court should be of opinion from the foregoing statement of facts, that the plaintiff ought to recover, then the referee reports, that the plaintiff recover of the defendant the sum of thirteen dollars and fifty cents damages and his costs ; and if from the foregoing facts, the court should be of opinion that the plaintiff ought not to recover, then the referee reports that the defendant recover his costs.”

The county court rendered judgement for the defendant, and the case was reserved for the opinion of this Court.

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Burt and Turner, for the plaintiff, contended, that there was good consideration for defendant's promise to redeliver the note, and that he was bound to perform it—That if the defendant withhold the note, he does it without any consideration. He has not sustained any injury in consequence of the plaintiff's keeping the horse a few days : the horse was not injured—That the agreement, that the note should be forfeited and become the property of the defendant, on failure of the plaintiff to procure the security for the balance of the value of the horse, was unreasonable, unconcionable, and a gambling transaction.

Sheldon, for the defendant, contended, that the facts contained in the report made a contract essentially different from the one set forth in the declaration, and did not at all support the declaration—That the general count for money had and received was not supported by the report, because the note sued for was not payable in *money* ; nor did it appear from the report the money had at any time been paid upon it—That the count for goods wares and merchandise was not supported, because promissory notes were not considered as goods, wares and merchandise, and did not come within the legitimate technical meaning of those *terms*—That by the terms of the contract, as found by the referee the note was forfeited, and had become the property of the defendant ; and it did not appear from the report that the promise made by the defendant to the plaintiff's agent, *to redeliver the note in question*, was founded upon any sufficient consideration.

HUTCHINSON J., *delivered the opinion of the Court*.—This is an action of *assumpsit* in three counts. The first alleges a special promise about a note, which clearly is not proved by the facts found and reported by the referee. The second count is general *indebitatus assumpsit* for money had and received ; and the third is a general count for goods sold and delivered. The referee reports the fact, that the defendant had sold the note in question, before the same was demanded by the plaintiff at the last call before the commencement of the action. This fact renders the defendant liable to the plaintiff on these general counts, provided the note was the property of the plaintiff. This overrules one of the objections made to the plaintiff's recovering, and brings us the principal question litigated ; that is, whether the

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note in question was the property of the plaintiff, and ought to have been delivered up to him.

It seems, by the report of the referee, that this note, of about thirrtteen dollars, was delivered by the plaintiff to the defendant in part payment for a horse, purchased by the plaintiff from the defendant, at the price of fifty-five dollars; and this under a further agreement, that, if the plaintiff should not, by a certain time agreed upon, furnish good security for the remaining value of the horse, he should deliver him back to the defendant, and the note should remain the property of the defendant. The security was not procured by the time agreed upon, and, soon afterwards, the plaintiff sent back the horse and demanded the note. The defendant made no objections to receiving the horse, but refused to give up the note. Now, it is contended by the plaintiff, that this sale of the note by the plaintiff to the defendant was void, being in the nature of a gambling contract. We have found no difficulty in deciding this point for the defendant. We discover nothing like a deposit of this note subject to a future casualty, or event, in a way which characterizes gambling contracts. The defendant's horse went into the possession of the plaintiff as the property of the plaintiff. He had a right to use him as his own. He had a right to sell him. If he had sold him for twenty or thirty dollars more than he gave for him, the gain would have been his. On the other hand, the defendant, while the horse was gone from him, not only lost the use of him, but was deprived of all power to make a sale, if any opportunity occurred. This may therefore be considered a fair contract, which the parties had an undoubted right to make, and in making which each could make his own calculations about the benefit of the contract to him, as well as he could as to what would prove to be the fair value of the horse.

We have had more difficulty about another point, suggested by the plaintiff's counsel : that is, whether the recital in the report of the after conversations of the defendant with the agent, who took back the horse, and with the plaintiff himself, did not amount to a rescinding or abandonment of the contract. We think, upon the whole, that the most that can be made of this is, that it is evidence tending to prove such rescinding or abandonment. And we must treat this report like a special verdict. We can infer no facts from evidence : we can only say what the law is upon the facts found. If the referee had, instead of detailing the evidence, reported such a rescinding or abandonment, we should have decid-

ed the contract at an end, and the defendant liable to the plaintiff for the amount of the note he received under the contract before it was rescinded. Perhaps the referee would have been warranted in drawing the inference of a rescinding of this contract; though I confess I see some difficulty in it. The defendant's strongest expressions, that he would give up the note, were accompanied with threatenings to sue for damages, when he said he would give up the note. If we would view it as a promise, we find no consideration for the promise. And no circumstance is reported, and no conversation detailed, but what would leave it probable, that the defendant was equitably entitled to something from the plaintiff, on a settlement of the whole concern, if he gave up the note. Similar conversations while the plaintiff had the horse, and which might have induced him to return him to the defendant, would have had a stronger tendency to prove a rescinding or abandonment of the contract. But what is now said about the weight of the evidence detailed, I say for myself only. We are deciding the cause as upon a writ of error, and must decide upon the facts found. And, as the county court decided for the defendant upon these facts, their

Judgement must be affirmed.

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SILAS B. HAZELTINE vs. SENECA PAGE, trustee of ELIJAH PARKER.

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This Court cannot reverse the decision of the county court in trustee actions, upon matters arising between the creditor and trustee, unless the facts are all placed upon the record in the county court, by a bill of exceptions, or otherwise.

It makes no difference in this respect, whether the action comes up by appeal, or by exceptions to the decision of the county court.

Exceptions should be drawn and signed by the judges, stating, that they found the facts as stated in the disclosure, or found such to be the facts, stating them, and, upon such facts, decide in favor of such a party.

The Supreme Court are no more judges of the weight of evidence in such actions than they are upon any writ of error.

A trustee of an absconding debtor will not be protected by a previous judgement against him in that capacity, when said judgement is to be satisfied in specific property, and cannot be enforced till a future time, and the monies or credits in the trustee's hands are due immediately.

Neither will a trustee be protected by having promised to pay the amount of his indebtedness to the creditors of the absconded debtor, if such promise be void by the statute of frauds.

This case was a trustee process brought by Hazeltine against *Page*, as the trustee of *Parker*, who was alleged to be an absconded or concealed debtor. The suit was commenced December 20th, 1828. It appeared from the disclosure of the trustee

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that in the fore part of October, 1827, he executed and delivered to *Parker* a promissory note for nine hundred dollars, payable in five years after date in horses, or other property, such as *Page*, *Pungy* could best spare; that afterwards, on the 9th day of the same month, *Hazeltine* caused process to be served on him as the trustee of *Parker*, and on the 10th day of the same month, David Read also commenced a trustee process against him as *Parker's* trustee; that these suits were both entered in court, and were pending at the time of said disclosure, and in both of which the trustee had, on the 13th day of December, 1828, filed disclosures stating that the promissory note before mentioned was due to *Parker* according to its tenor. The said *Page* further disclosed, that after the commencement of the two suits last mentioned, and before the commencement of the present action, he, at the solicitation of *Parker*, and relying on his promise to settle the first suits, made a settlement with *Parker*, and took up and paid the said note for nine hundred dollars, excepting a balance, for which *Page* gave his note to *Parker* for one hundred pairs of coarse shoes, payable on demand, and another note for either forty or seventy dollars, (which sum he could not ascertain,) payable in boots and shoes on demand;—that after said settlement, and the execution of these two notes, and before the commencement of the present action, he, *Page*, became answerable to pay to Elijah Barnes forty dollars, if the title to certain lands which *Parker* had sold to Barnes, should fail; also to Read and Beardsley six or seven dollars; to Augustus Burt the amount of his charges as attorney in the two suits above mentioned; to Mr. Stowell about six dollars, and to Smalley and Adams the amount of their fees as attornies in the said two suits, if he should have any funds after paying the other debts specified; the amount to be paid to Burt, and to Smalley and Adams could not be then ascertained, as the two suits were not terminated. All these sums the trustee stated he had agreed to pay at the request of *Parker*. *Page* further stated in his disclosure, that he had a further claim against *Parker* for his costs as trustee in the two first suits, and for money paid counsel in the same, amounting to \$14,50. It appeared that the agreement to pay these several sums was not reduced to writing, excepting the agreement to pay Barnes, as before mentioned. At the trial in the county court at September term, 1831, it appeared that judgements had been rendered against *Page* in the two suits before mentioned, according to his disclosure, in the one in which *Hazeltine* was plaintiff, for \$5,32 damages and \$5,32 costs, and

x *Page*

in the other for \$54,08 damages and \$18,15 costs. The cause was tried on the disclosure and other evidence, and a judgement was rendered in favor of the plaintiffs. *Page*, the trustee, excepted, and the following bill of exceptions was allowed, on which the cause was brought before this Court for revision.

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"In addition to, and explanation of, the disclosure in this case, the proceedings and disclosures in the former suits against *Page*, as trustee of *Parker*, and mentioned in the disclosure in this suit, were read in evidence. In order to show that the liability of the trustee to Barnes, set forth in the disclosure, had ceased, the plaintiff read in evidence the record of a mortgage discharged, executed by Barnes to *Parker*, which was the incumbrance against which the trustee had undertaken to indemnify Barnes, as mentioned in the disclosure. It was proved that sometime previous to the commencement of this suit, *Parker* employed Burt, as counsel, in the two suits of *Hazeltine* and *Read* against *Page*, as trustee of *Parker*, mentioned in the disclosure, telling Burt that *Page* would pay his fees; that within a short time after, and previous to this suit, Burt enquired of *Page* if he would be accountable, and he agreed to stand charged for Burt's services in the said two suits. Whereupon the charges already made were transferred by Burt to the account of *Page*, and all subsequent charges in said suits were made by Burt directly against *Page*. It was further proved that Smalley and Adams were counsel for *Parker* in the same suits, and in this suit, but that their charges were made against *Parker* alone, and had never been transferred to the account of *Page*, nor had he ever undertaken in writing to be accountable for the same. Evidence was given as to the value of coarse shoes. Upon the disclosure and evidence, the court decided that the trustee was not entitled in this case to any deduction on account of the two former suits in favor of *Hazeltine* and *Read*, on the ground that the disclosure was too general and unsatisfactory as to the manner of satisfying the nine hundred dollar note, and as to the undertaking of *Parker* to satisfy the judgements against the trustee; nor on account of his undertaking to Barnes, on the ground that the claim of Barnes was extinguished by the discharge of the mortgage aforesaid; nor on account of his undertaking to Smalley and Adams, on the ground that said undertaking was void, at least, as against an attaching creditor, by the statute of frauds. And the court further found the value of the shoes to be one hundred and seventeen dollars, and the sum due on the trustee's second note to *Parker* to be forty dollars, making in the whole one hundred and fifty-seven dollars. The court further considered from the disclosure, that this sum was already due and payable. From this sum the court deducted and allowed to the trustee the payment to *Read* and *Beardsley* of six dollars, the payment to *Stowell* of six dollars, the amount of Augustus Burt's account, found from the evidence to be fifty dollars; making in all

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FRANKLIN, the sum of sixty-two dollars, leaving the trustee liable for ninety-five dollars. Out of this sum the court allowed to the trustee for his own time and travel, and attending court, seven-dollars and sixty cents. And for the fees and disbursements of his counsel in this suit twenty-two dollars fifteen cents; making together twenty nine dollars and seventy-five cents: which sum being deducted from the aforesaid amount of his liability left the sum of sixty five dollars and twenty-five cents, which was adjudged to be in the hands of the trustee subject to the plaintiff's execution. To all which the trustee excepts."

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Smalley and Adams, for defendant.—1 The amount of the judgement in the two first suits against *Page* ought to have been deducted from the sum found in *Page's* hands, in addition to the sum deducted by the county court. The plaintiff is not entitled to draw from *Page's* hands any sum of money or other property, unless *Parker* could have drawn the same from *Page* at the time of the commencement of this action. A short examination of this case, as exhibited by the papers, will show that *Parker* was not entitled, either in law or equity, to draw any funds from *Page's* hands at the time of the commencement of this suit, until he had settled the two suits then pending against *Page* as his trustee.

2. This case has nothing to do with the statute of frauds. The statute does not prohibit, restrain, or limit, or in any way qualify, the right which a creditor has to direct his debtor to pay to whomsoever the former sees fit. Nor are the obligations of the debtor intended to be affected by the act.—*G***** vs. Philips, et al.* 10 Johns, 412; *Com. Contracts*, 181, and the authority there cited. The engagement of *Page* to pay for the services of Mr. Burt and Smalley and Adams, *Parker's* counsel, was nothing more than a mode of paying his own debt.—*Roberts on Frauds*, 208 and seq, 224, 232. Unless this undertaking can be brought within the statute of frauds, there was error in the decision of the county court. The fact that Smalley and Adams did not charge to *Page*, is sufficiently explained by the disclosure, He was not to pay their charges unless the funds should hold out,

3. The decision of the county court, that the sum found in *Page's* hands was now due and payable in cash, is clearly erroneous.

Read, for the plaintiff.—1. It appears from the disclosure made by *Page* in the two suits referred to in his last disclosure, that there was \$900 due from him to *Parker* at the commencement of said suits; and further, that but about \$70 was recover-

ed in said suits against the principal debtor. The statute (sec. 5) relating to absconded or concealed debtors, (see stat. 151,) is peremptory on this subject, and makes the trustee liable for the full amount of the debt, if he had sufficient funds or property in his hands at the time of the service of the process ; and if he shifts or varies the condition of the property, or pays up the principal debtor, relying upon his responsibility to meet the judgements that might be recovered against him, it can in no way affect or vary the rights of the attaching creditor. Further, the burthen of proof is on the trustee as to the true state of the funds in his hands ; and if he does not clearly state their condition or manner of disposal in his disclosure, as becomes his duty, all legal presumptions will be taken against him ; and how much *Page* had paid towards the \$900 note, or in what manner the same was settled, was matter of fact for the court below to determine.

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2. Whether the claim in favor of Barnes should have been deducted or not, rested also upon matter of fact which the court below have decided, and which this court will not attempt to review. The same as to whether said notes were due and payable.

3. The decision of the court in not deducting the claim in favor of Smalley and Adams against *Parker*, was correct, as the undertaking on the part of *Page* furnished them with no legal claim against him to recover the same ; but, on the other hand, was void under the statute of frauds.—See *Stat.* 115 ; *Rob. on Frauds*, 207-8 ; *do.* 222-3.

HUTCHINSON, C. J., *delivered the opinion of the Court.*—There appears to be not much in controversy in the present case, except what depends upon the weight of evidence ; and we have no more to do with that, than we should have in any writ of error. And, in this respect, there is no difference, whether the action comes up by appeal, or by exceptions to the decision of the county court. We can hold appellate jurisdiction from the county court only to revise their decisions upon matters of law, arising from the facts, in some way placed upon the record. If the disclosure of the trustee is treated as true, let the judges certify, that they found the facts to be as stated in the disclosure. If there is other testimony, also, let them certify, in detail, what facts they find proved by the disclosure and other testimony. The disclosure itself may be so defective and incoherent, that no person can believe all the facts it contains. And, while we admit other testimony, either to contradict or support the disclosure, as

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ever has been done in this state, we must treat the disclosure rather as evidence, than as a record document. Still, if it appears consistent in and of itself, and stands uncontradicted by other testimony, it is treated as containing the truth. Yet, as the other testimony is not always on paper, we know not whether the county court treated it as true or not, without their certificate upon the subject. In the present case, the exceptions allowed show what facts they found proved, and the decision they made upon those facts. And the defendant now urges that the facts thus found require a decision, that *Page* might retain out of the two notes, last given by him, sufficient to indemnify him against the two suits named in his disclosure; also that he should be allowed the sum he agreed to pay to Smalley and Adams, being their debt against *Parker*, the principal debtor. If we treat the facts upon these points as the defendant conceives they must have been found, and even treat the disclosure as true upon these points, still we must bear in mind that the two last notes, which the county court valued at one hundred and fifty seven dollars, were not left in the hands of *Page* as a fund to pay the previous judgements: but it was made payable immediately; and at most, *Page* only took the promise of *Parker* to indemnify him against those judgements. Now those judgements could not take effect against *Page* till 1832-3—and then they might be satisfied in horses, &c. Of course, this promise could not be pleaded in offset, or set up in any way against the collection of the new notes. Nor would a court of equity interfere, even as against *Parker*, to stay the collection, on account of that executory promise. It would be necessary to show the inability of *Parker* to fulfil the promise. Nothing of this sort appears here. And does it follow, that an attaching creditor of *Parker* is to be restrained—even if *Parker* would be? So long as the right of *Parker* to the \$157, is a legal right, is not that enough for a creditor?—Why is this different from the case of specific chattels belonging to *Parker* in the hands of *Page*—not deposited there as a pledge against the promise of *Parker*—but to be redelivered when called for. A creditor goes and attaches that property; shall his execution be prevented on account of that promise? As to the debt of Smalley and Adams, and the application of the statute of frauds; no debt of *Page* to *Parker*, or of *Parker* to Smalley and Adams, is discharged by the verbal promise of *Page* to Smalley and Adams, unless the promise *ipso facto* operates to discharge those debts. But the account of Smalley and Adams was continued against *Parker*: thus rebutting the presumption of

its discharge as against *Parker*.—*Vide Livingston vs. Wilkinson*, Sup. C. F. C. January T. 1828. No new consideration passed between Smalley and Adams and defendant. It is not like *Williams vs. Leaper* in *Burrow*. To make it similar, Smalley and Adams should have been about to attach the property of *Parker* in *Page's* hands—then *Page's* promise (with the assent of *Parker*, and perhaps without it) to pay their debt, in consideration of withdrawing their attachment. If not within the statute—is the promise grounded on any sufficient consideration? To make a consideration, was it not necessary that *Page's* promise should have been accepted in satisfaction of *Parker's* debt?—*Page's* authority under *Parker* was to pay the debt to Smalley and Adams, and not to embarrass the property of *Parker* by making a collateral engagement short of extinguishing the debt as against *Parker*. The court made the proper distinction between this claim of Smalley and Adams, and that due to Mr. Burt. Burt had accepted *Page* as his debtor, and charged him, and discharged *Parker*. The county court allowed *Page* to retain that amount.

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The defendant has urged one further objection; that the court were not warranted in adjudging *Page* as trustee of the monies of *Parker*, when one note was merely for so many pairs of shoes. The exceptions show, that the court found, from the disclosure, that the note payable in shoes had become due and payable. Hence they set a value upon the shoes, and considered that value to be money in his hands. Were it our province to decide upon the evidence, we should consider it as well warranting the decision of the county court. The note for shoes was payable on demand. The disclosure states his undertaking to pay divers money debts on account of it, to nearly its value, and says the remainder is due. If, by its being due, might not be intended that it was payable, yet his undertaking to pay so many money debts, well warranted the presumption that the shoes had been demanded, and the note become payable in money.

The judgement of the county court is affirmed.

Smalley & Adams, for the trustee.

Read, for the plaintiff.

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ERASTUS D. HUBBELL vs. SAMUEL DODGE.

In an action on a bond of cognisance, entered into at the time of suing out a writ of *audita querela*, conditioned for the redelivery of the execution debtor to the custody of the officer, and the payment of all intervening damages, and, in default thereof, the payment of the debt damages and costs,—it was held that the recognisor, not having fulfilled the conditions of his recognisance, was liable for the whole debt and costs.

This was a *scire facias* brought on a recognisance entered into by Dodge, the defendant, before one of the assistant judges of the county court, conditioned for the prosecution of a writ of *audita querela*, in favor of one Mark Dodge against the plaintiff, and for the redelivery of the body of said Mark to the custody of the jailer, (if the same should be awarded,) in whose custody he was at the time of entering into the recognisance, and also for the payment of intervening damages; and in default thereof, the payment of the debt, damages and cost.

It appeared that Mark Dodge had been committed to jail by virtue of an execution in favor of the plaintiff; that he afterwards prayed out a writ of *audita querela* for the purpose of setting aside the execution for certain causes therein mentioned; that on that occasion the defendant entered into the recognisance in question; and that thereupon the said Mark was discharged from imprisonment. The record of the case showed that he did not prosecute his writ of *audita querela* to effect, that judgement was rendered for the plaintiff to recover of said Mark \$3,80 damages, and \$34,41 cost, and that the court awarded the redelivery of the body of said Mark to the custody of the jailer who had had him in keeping. The intervening damages and cost had not been paid, nor had the defendant redelivered the said Mark to the jailer. The only question for the consideration of the court was the measure of damages.

It was contended, on the part of the Plaintiff, that the only measure of damages was the amount of the execution on which the said Mark was committed, the officer's fees thereon, the interest on the same, the amount of intervening damages, and cost in the *audita querela*; for that by virtue of the writ of *audita querela* the body of the said Mark was liberated, and it was not in the power of the plaintiff in any way, or by any process of law, to retake the body or property of the said Mark, or in any way to enforce the collection of the Execution on which he was committed; that he could not take out an alias execution, or sue out a *scire facias* to revive said judgement; but that, on the other hand, it was perfectly in the power of the defendant, if he wished to avoid the payment

of the execution on which the said Mark was committed, to have taken a copy of the record of the judgement, rendered by the Supreme Court in the *audita querela*, awarding the redelivery of the body of the said Mark, and have committed him to the keeper of the jail; and this would have exonerated him from that condition in his recognizance; that if the plaintiff would have a remedy predicated upon that judgement, it would be wholly unreasonable that he should be put to the expense, either of prosecuting a *scire facias* to revive the judgement, or of recommitting the said Dodge: it was enough for him that he had once committed him on a legal execution.

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HUTCHINSON, C. J., *pronounced the opinion of the court.*—Judgement having been rendered for the plaintiff to recover the penalty of the bond sued, in fixing upon the sum due in equity, there is no dispute about the plaintiff's being allowed the intervening damages for interest, and his cost: but, as the body of the original debtor was not returned to the keeper of the prison, whence he was liberated by the *audita querela*, the plaintiff claims the whole debt. This is opposed by the defendant; not by any proof that the original defendant was redelivered according to the condition of the bond in question, but, because the plaintiff has not shown, that he prayed out an alias execution and delivered it to the keeper of the prison, for him to commit anew: and this is compared to a bond for the redelivery of chattels that had been taken from the officer, who held the same in execution. We think the case does not compare at all. In such case, the original execution was not satisfied, and an alias might issue. But, when the debtor is in prison on the execution, that is a satisfaction of the execution, appearing on the same; so that an alias cannot issue without a *scire facias*, setting forth an escape, or some cause, why it should not be considered satisfied, that an alias may be obtained. But our statute regulation of *audita querela*, when so issued as to operate as a *supercedas*, takes the body of the debtor from the prison, and provides security for his return, if his writ fail, by such a bond as the one now in suit. If the prisoner returns into custody, there need be no alias execution; he submits to his original imprisonment: and the original execution, and the order of court for his return to prison, form a sufficient authority for the jailor to hold him till the debt is paid. And it is incumbent on the debtor and his sureties to see to it, that the debtor go to the jailor, with a copy of this order, and deliver that and his body to the

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custody of the jailor. Till that is done, the bond is in full force, as a security for the whole debt. This well compares with the case of a person in prison, brought up by *habeas corpus*, and remanded by order of court. He is then in on the same process as before. In this case, the plaintiff must recover his whole debt, if it do not exceed the penalty of the bond, together with his costs.

Hunt & Beardsley, for plaintiff.

Read & Turner, for defendant.



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TOWN OF ST. ALBANS AND OTHERS vs. JOTHAM BUSH.

A Circuit Court of the United States is not a foreign court, nor a court of inferior jurisdiction, and *nil debet* is not a good plea to a judgement rendered by such court.

Where an attorney, without any license or authority, instituted a suit against A in favor of B, and judgement was rendered therein for the defendant to recover his costs, —it was held, in an action brought by A against B on said judgement, that B was bound thereby, and could not plead the want of authority in the attorney.

This was an action of *debt* on a judgement rendered by the circuit court of the United States for the district of Vermont. The defendants pleaded, *firstly*, *Nul tiel record* : *secondly*, That at the time of the commencement of the suit in which said judgement was rendered, he was, and ever since has been, an inhabitant of Boylston, in the state of Massachusetts, not subject or amenable to the jurisdiction of said court ; that he never was served with process in said suit, was not notified of it, and had no knowledge of the pendency of the same ; and that he never appeared in the suit to prosecute or defend the same : *thirdly*, *Nil debet*. The plaintiffs joined issue on the first plea. To the second plea, they replied as follows :

“ And now the said plaintiffs as to the said second plea of the defendant, as above pleaded, say, that they from having and maintaining their aforesaid action thereof against the defendant, ought not to be barred, because, That, although, true it is, that the time of the commencement of the suit in which the said recovery of the judgement mentioned in the plaintiffs’ declaration was obtained, and during all the time between the time of the commencement of the said suit and the recovery of the said judgement mentioned in the plaintiff’s declaration, the said defendant was an inhabitant and resident of Boylston, in the commonwealth of Massachusetts ; yet the plaintiffs say, that the said suit in which the judgement mentioned in the plaintiffs’ declaration, was obtained, as aforesaid, was duly and legally brought and commenced by the said defendant, in his own name, who then was a citizen of said state of

Massachusetts, against the said plaintiffs and one Silas Robinson, late of St. Albans, deceased, who then were citizens of Vermont, returnable before the said circuit court at the term holden at Windsor, within and for the District of Vermont, on the 21st day of May, 1827, to recover of the said plaintiffs and the said Silas Robinson the seizin and peaceable possession of a certain tract or parcel of land, lying and being in St. Albans, in the county of Franklin, and State of Vermont, known and described as lot no. 81; and that the said suit was duly entered in said circuit court, at the term last aforesaid, by the said defendant, and by him prosecuted in said court from term to term, until the term of said circuit court, holden at Rutland, within and for said district of Vermont, on the 3d day of October, 1827, at which term the plaintiffs, by the consideration of said court, recovered of the defendant the said judgement mentioned in the said declaration, as by the records of said circuit court will more fully appear; all which the plaintiffs are ready to verify.

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To the plea of *nil debet* the plaintiffs demurred.

Defendant's Rejoinder.—And now the defendant by his attornies rejoins to the said plaintiffs' replication, and says, that the said plaintiffs ought not, by reason of any thing by the said plaintiffs in said replication alleged, to have and maintain their aforesaid action thereof against said defendant, because he says, that one Cornelius P. Van Ness, formerly of Burlington, in the county of Chittenden, and state of Vermont, without the authority, license, consent, permission or knowledge, of the said defendant, did commence and prosecute said suit in said circuit court in the name of said defendant, against said plaintiffs, and that the said Cornelius P. Van Ness, or any other person, was never, either before or after the commencement of said suit, directed, authorized, licensed, or permitted, by the said defendant, to sue and prosecute said suit in said circuit court in the name of the defendant, against the said plaintiffs; without this, that the said suit, in which the said supposed judgement in the plaintiffs' declaration mentioned, was obtained, was duly and legally brought, and commenced by the said defendant, in his own name, in said circuit court, for the district of Vermont, and was by him, the said defendant, prosecuted in the said circuit court from term to term, or at any other time or term, in manner and form as the same in said replication is alleged; all which he the said defendant is ready to verify.

To this rejoinder the plaintiffs demurred.

The county court rendered judgement for the plaintiffs, and the case was reserved for the opinion of this Court. ♦

Smalley and Adams, for the defendant.—I. The first question arising in this case is on the validity of the plea in bar. Is it a bar to the action? The averments therein show a total want of jurisdiction in the court rendering the judgement.

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1. The circuit court, as to a state court, is a foreign court.—It derives its authority from, and is established and supported by, a power independent of any one state. Its judgements cannot be enjoined or revised by the state courts: nor can it enjoin, revise, or in any way disturb the judgements of state courts. This constitutes them, as respects each other, foreign courts.—“A judgement of an unconnected, independent jurisdiction is what the law calls a foreign judgement.” If a foreign judgement, it is only *prima facie* evidence of a debt.—*Baldwin vs. Hale*, 17 Johns. 272; *McKim vs. Voorhees*, 7 Cranch, 279; *Diggs vs. Keith*, 4 Cranch, 179; *Philips vs. Hunter*, 2 H. B. 402; *Walker vs. Witter*, 1 Douglas, 1, in notes.

2. The circuit court is an inferior court of special and limited jurisdiction. Its jurisdiction is limited by the matter in dispute, and restricted to persons of a particular description or local residence.—On general principles, where the judgements or decrees of such a court are submitted to an independent tribunal, the jurisdiction of the court must be established before its judgements can be noticed.—The rule applied to courts of limited jurisdiction, is that every case is presumed to be *without* their jurisdiction till the contrary appears.—*Constitution of U. S. Art. 3d. Sec. 2d*; *Graydon's Digest*, 241; 1 *Saunders*, 74, in notes; *Marshalsea case*, *Coke's Abr.* 300; *Godwin vs. Gibbons*, 4 Bur. 2108; *Latham vs. Egerton*, 9 Cowen, 227.

3. But granting that the judgements of the circuit court are not to be subjected to the common law rules, by which the validity of judgements of inferior courts in the technical sense of the term, are tested; that the presumption is in favor of jurisdiction in all cases where it has attempted to exercise it; is this presumption too strong to be repelled? Is there any peculiarity in the constitution of a circuit court, or in the mode in which it exercises its authority, which shields its judgements from all exceptions? To say of a court, that it is of special and limited jurisdiction, and has cognisance, not of causes generally, but only of a few specially circumstanced, and yet in all cases where it assumes jurisdiction, the party whose rights are affected by the assumption shall not be permitted to repel it, would be to state an inexplicable enigma. A tribunal of defined and limited forms, with the privilege of assuming whatever it might see fit, would be intolerable, and without precedent in the judiciary of any country. Yet this must be the circuit court, unless its want of jurisdiction in a particular case can be shown by plea. For its judgements cannot be

reversed in the state courts ; it cannot be restrained from proceeding by the supreme court of the United States ; nor its judgements be there reversed, except in cases where the matter in dispute exceeds two thousand dollars.—*Graydon*, 243, 245. Here then, is a court of defined and limited jurisdiction, exercising with impunity unlimited jurisdiction over all persons, whether within reach of its process or not—a court, the judgements of which, except in a few specially circumstanced cases, cannot be reversed on error ; and yet, if this plea cannot avail the defendant, they are of a character too sacred to be questioned.

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4. The maxims, “that nothing can be assigned for error, nor can any averment be admitted which contradicts a record ;” “a record imports in itself such incontrovertible credit and verity that it admits of no averment, plea, or proof to the contrary,” are but idle *truisms* in reference to the question before the court.—9 *Cowen’s R.* 227 ; 19 *Johns. R.* 7 ; *Elliott vs. Persol et al.* 1 *Peters*, 328–40 ; 15 *Johns.* 121. They import nothing more than what is expressed in the rule, that a subject once adjudicated upon by a tribunal of competent jurisdiction, can never again be litigated between the same parties. We do not controvert this doctrine. The questions are, can the jurisdiction of the circuit court be inquired into ? Does the plea negative its jurisdiction in the case under consideration ? We take the affirmative of both these questions. We insist that a judgement of the circuit court is not of irresistible validity ; that it may be impeached, its enforcement resisted, or a title under it defeated, by shewing that the court had not jurisdiction over the process, the subject matter, or the person. This proposition rests upon principles universally received and acknowledged to be obligatory upon all courts. Whenever a right is claimed in one undefined jurisdiction, by virtue of the acts of another, the jurisdiction of the court, under which the right is claimed, is directly put in issue. Thus, courts of admiralty acting *in rem* proceed according to the law of nations, and their judgements are binding on all the world.—1 *Phil. Evi.* 267 to 73 ; 1 *Starkie*, 238. Yet, where a title is asserted under a decree of a court of admiralty, the question whether it had jurisdiction is open ; and not only the constitutional power of the court is examinable, but the state of the thing, to ascertain whether it was in such a situation that the court professing to pass sentence upon it, could lawfully exercise jurisdiction over it.—*Rose vs. Himley*, 4 *Cranch*, 241. And if the court from its constitutional power had not jurisdiction, or the thing was not in a situa-

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tion to enable it to exercise jurisdiction upon it, the decree condemning it is *coram non judice*, and void.—*Slocum vs. Wheeler*, 1 Conn. R. 429 ; 19 Johns. 7 ; *Ryder vs. Alexander*, 1 D. Chip. 267.

5. The judgements of the circuit court of the United States cannot stand on a better footing than the judgements of state courts. The plea would be a bar to a judgement of one state court when prosecuted in the courts of another.—4 Cow. Rep. 292 ; 4 Conn. Rep. 380 ; 15 Johns. Rep. 121 ; 6 Pick. Rep. 232. Questions as to the validity and effect of the judgements of one state court, when sought to be enforced in another, have been variously determined in the courts of the several states of the Union. But the universally received opinion at present, is, that their operation and enforcement may be resisted by plea, shewing the want of jurisdiction of the court in the particular case.—6 Conn. Rep. 508 ; 1 Caines, 461 ; 9 Mass. 462, and cases already cited ; also, 9 East, 192 ; 1 Term Rep. 32 or 55. The governing principle of all the cases both in England and this country is, that a party can never be bound by the judgement of a court when he has had no opportunity to be heard in his defence. Can any satisfactory reason be assigned why this principle should be abrogated as to judgements of the circuit court ?

6. If it be urged that the defendant, in the introduction to his traverse of the replication, admits that one C. P. Van Ness commenced and prosecuted the suit in the circuit court, how can it avail the plaintiffs ? It is not admitted that this Van Ness had authority to commence or prosecute the suit : on the contrary, it is expressly denied him. Neither is it admitted that he was an *attorney* of the circuit court. The record of that court is not a part of the record before this court. It is not then easy to comprehend how this admission can have any bearing upon the questions in this case.

7. A judgement obtained by fraud or imposition is void.—*Fermor's case*, 3 Co. 78. Fraud vitiates all acts. " But although such sentences [judicial] are conclusive, and cannot be impeached from *within*, yet like all other acts of the highest judicial authority, they are impeachable from without."—1 Philip's Ev. 261 ; 1 Starkie, 253. Fraud is an extrinsic collateral act, which vitiates all judicial acts whether ecclesiastical or temporal.

II. The plea of *nil debet* is a proper *general issue* in this case.

1. *Nul tiel record* is the proper *general issue only* in those cases, where the party merely denies the existence of the record set forth, and where the identity of the record declared on with the

one offered in proof, must be determined by the court, on inspection of the original record, or of its tenor brought in by *mittimus* or *certiorari*. *Com. Dig. Plead.* 2 *W* 13 ; 1 *Chitty*, 481, 537. FRANKLIN,
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2. The rule that *nul tiel record* is the only proper general issue to debt on judgement, would be absurd, if applied to records of courts of limited jurisdiction. The principle of the rule is said to be, that the binding force of the instrument declared on must determine what the plea shall be. But neither the Court nor the pleader can judge whether the instrument—if it be the judgement of a court of limited jurisdiction—is binding or not, till it is produced. If when produced it appears that the court rendering the judgement had not jurisdiction, the judgement is a nullity. Hence the case must be tried, before any general issue could safely be found.

3. The circuit court is a foreign court.—17 *Johns.* 272 ; 2 *H. B.* 402 ; 9 *East*, 192.

4. The plea of *nil debet* on judgement of one state court, when sought to be enforced in the courts of another, is sanctioned by a series of decisions from the organization of the confederation to this time.—*Bartlet vs. Knight*, 1 *Mass.* 491 ; *Bissel vs. Briggs*, 9 *Mass.* 462 ; 6 *Pick.* 232 ; 1 *Caines' Rep.* 461 ; *Kilburn vs. Woodworth*, 5 *Johns.* 37 ; *Taylor vs. Bryden*, 8 *Johns.* 133 ; *Fenton vs. Garlick*, 8 *Johns.* 150 ; 15 *Johns.* 121 ; 12 *Mass.* 25. It is a convenient general issue founded on an intelligible principle, and ought not to be departed from without substantial reason. The case of *Mills vs. Durkee* is the only case which seems to bear against the validity of such plea. But that case, properly understood, is not calculated to shake the authority of the previous cases.

Smith and Aldis, for the plaintiffs.—It is contended that the plea of *nil debet* and plea in bar can not be pleaded with that of *nul tiel record*. The defendant having pleaded *nul tiel record*, and an issue having been taken on said plea, and found for the plaintiffs, the court are bound to reject the other pleas as altogether inconsistent with the issue, and judgement of the court thereon. The plaintiffs set forth in their declaration a good and valid judgement, duly and legally recovered before the circuit court, against the defendant, and such a judgement the county court have, on inspection of the record, (of which a profert was made in the declaration,) found was duly and legally rendered by the circuit court.

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The legal consequence of this finding of the county court on the issues of fact is, that the plaintiffs recovered of the defendant their debt, damages and costs. This judgement can not in the least be affected or controlled by any judgement of this court on the issue of law, as this Court have no power to review or set aside the judgement of the county court on the issue, whether there was or was not such a record as is set forth in the plaintiffs' declaration.—2 *N. Y. Dig.* 707; *Coleman's cas.* 35.—But should this Court consider that the other pleas of the defendant are properly before them, then it is contended by the plaintiffs, that when the record is the foundation of the action, as in this case, and not merely inducement, the plea of *nil debet* is insufficient; and in this case it is immaterial whether the judgement of the circuit court be regarded as a domestic judgement, or as standing on the footing of the judgement of a sister state.—1 *Chit. P.* 480; 11 *Johns. Rep.* 474; 8 *Johns. Rep.* 82; 1 *East*, 373; 7 *Cranch*, 481; 3 *Wheat.* 234.

Again; it is contended that the defence set up in the plea in bar of the defendant, and the rejoinder to the plaintiffs' replication, do not constitute a legal and admissible defence to this action, inasmuch as it tends to impeach collaterally the validity of the judgement of a court having jurisdiction of the subject matter of the suit in which the judgement was recovered, and also of the parties to that suit. It is a well settled maxim of law, that no averment can be made in pleading against the validity of the record: and the relief or remedy in this case is by some direct application to vacate, or set aside, the judgement which is the foundation of the suit.—1 *Chip. Rep.* 383; *Cowp.* 315; 3 *Term Rep.* 125; 2 *B. & P.* 391; 12 *East*, 75; 16 *East*, 21; 1 *Chit. Plead.* 353, 480; 8 *Johns. Rep.* 61; 2 *Vt. Rep.* 263; 12 *Mass. Rep.* 268.

The judgement of the circuit court of the United States must be treated by this Court to all intents and purposes as a domestic judgement: but, to say the least, it must be placed on the footing of a judgement rendered by a court of a sister state. In all cases when the courts of another state have jurisdiction of the *subject matter*, and of the parties, their judgements are to be regarded, as to their legal effect, as a domestic judgement.—*Constitution of U. S.* 4 *Art. Sec.* 1; 2 *Laws U. S.* 102-3, (ed. 1815;) 7 *Cranch Rep.* 481; 3 *Wheat.* 234; 2 *Dall.* 302; 9 *Mass. Rep.* 452; 1 *Starkie*, 215, note; 1 *Pet. Rep.* 155; 2 *Vt. Rep.* 263. It is further contended, that as plaintiffs in

their declaration make a profer of the records and proceedings of the circuit court, this record must be treated as constituting a part of the pleadings in this case. From this it appears that the defendant appeared in said circuit court, by his attorney, C. P. Van Ness, and prosecuted the action in favour of the defendant, against the plaintiffs in this suit; consequently the defendant is precluded from alleging in their suit, that the said C. P. Van Ness was not authorized to prosecute the suit in said circuit court in his behalf, inasmuch as the record imports *absolute verity*. 1 *Pet. Rep.* 155; 1 *Starkie*, 215, note; 2 *Vt. Rep.* 269.

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Again; when an attorney enters an appearance, either to prosecute or to defend a suit, without the knowledge or consent of the party, and even when the party has no notice—a judgement rendered under such circumstances, is absolutely binding on the party, and the court will not, even on application for such a cause, set aside the judgement: the party enjoined must seek his remedy on the attorney, or by an application to the court for a new trial. —*Tyler's Rep.* 304; 2 *Vt. Rep.* 263; 8 *Johns.* 298; 1 *Binnay's Rep.* 214, 469; 1 *Salk.* 89, 86; *Com. Dig. Atty. (B)* 7; 6 *Johns.* 296; 7 *Pick. Rep.* 137.

The opinion of the Court was pronounced by

HUTCHINSON, C. J.—This is an action of *debt* upon a judgement recovered before the circuit court of the United States, for the Vermont district, for the costs of a suit to which the plaintiffs and one Silas Robinson, since deceased, were parties. The declaration contains no averment whether the present plaintiffs were plaintiffs or defendants in that suit, except the strong implication, that they were defendants, by their recovering a judgement for costs only. The defendant pleaded several pleas in the county court: 1st. *Nul tiel record*. This was found against him. 2d. *Nil debet*, concluding to the country. To this the plaintiffs demurred; and the county court decided this plea to be bad. 3d. The defendant in his third plea set up in bar, that at the time when the action in the circuit court was commenced, &c., he lived at Boylston, in Massachusetts, and was resident there, and was not in the state of Vermont, and had no notice of the suit, and no writ was served on him in said suit, &c. This third plea must of course have been a nullity, if the plaintiffs had averred in their declaration, that the judgement declared upon was rendered in an action brought against them by this defendant. The want of such an averment has driven the plaintiffs to a special replication; in which they set

FRANKLIN, forth in substance, that the action in the circuit court, in which they
January, recovered their judgement, was an action of ejectment, brought
1832. by this defendant against them, for a lot of land in St. Albans ;
St. Albans et al. and they add all the averments of citizenship of different states,
vs. &c. which show, conclusively, that the circuit court had jurisdic-
Bush. tion of the action ; and then proceed and affirm, that the de-
 fendant entered and prosecuted said suit, &c., till they recovered
 their said judgement for costs, as in said declaration is set forth ;
 adding also, " as by the records of said circuit court will more fully
 appear ;" and conclude with a verification.

To this the defendant rejoins, that one Cornelius P. Van Ness, without the authority, license, consent, permission or knowledge, of this defendant, did commence and prosecute said suit in the name of this defendant ; but was never authorized so to do, either before or after the bringing of said action ; *absque hoc*, that the said suit, &c., was brought and prosecuted in said circuit court by him, this defendant, as set forth in said replication ; and this he is ready to verily, and prays judgement, &c.

To this rejoinder the plaintiffs put in a general demurrer. And the county court adjudged this rejoinder to be bad. And the defendant filed exceptions to these decisions of the county court, upon the demurrers, and has brought the case up in the way pointed out by statute ; and he comes now into this Court as a plaintiff in a writ of error.

Mr. H. Adams, in a laboured argument for the defendant, adducing many cases as authorities, endeavoured to support the positions, that, as to a state court, the circuit court of the United States is a foreign court ; that it is an inferior court, of special and limited jurisdiction ; that their judgements are void when they have no jurisdiction of the cause, and that the record does not estop the defendant from showing by plea, that which shows that the court had no jurisdiction. From all which positions he inferred, that *nil debet*, concluding to the country, was a good plea to this action ; also, that the facts set forth in his rejoinder are good and sufficient to show this defendant not bound by this judgement ; and further that the traverse in his rejoinder met the gist of the plaintiff's replication. We have felt no disposition to hear the plaintiff's counsel upon a case so plain. Indeed, the defendant's counsel might have saved themselves considerable labor, by examining two decisions of this Court, reported in the second volume of *Vermont Reports*, *Hoxie vs. Wright*, page 263, and *Bellows et al. vs. Ingham*, page 575. Soon after the establishment of

the constitution of the United States, there were decisions in Massachusetts and New-York, which treated judgements of the courts of the neighboring states as foreign judgements, and admitted defendant to impeach them, and inquire into the original merits. But those decisions have long since been overruled, and, we believe, are no where treated as law. The first time the subject was investigated by *Judge Parsons*, that doctrine was overruled. It never was adopted in this state. If the debtor in the judgement was not an inhabitant of the state in which the judgement was rendered, and never submitted to the jurisdiction of the court rendering the judgement, and never appeared in the action, either by himself or attorney, he is not bound by the judgement, when sued upon it in another state : but he may plead specially that which shows that the court which rendered the judgement, had him not so before them as to have jurisdiction over him ; and thereby avoid its *prima facie* force over him. But if the court, rendering the judgement, had no jurisdiction over the subject matter, when this is made to appear, the judgement is of no force any where. In such a case, we should treat one of our own judgements as a nullity.

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Should we treat the circuit court as we would treat the courts of a neighboring state, (and there seems no reason to treat them as of less power, or as entitled to less respect,) they are not foreign courts in the sense the defendant contends for.

It seems rather singular to hear the circuit courts spoken of as of inferior jurisdiction, when they have jurisdiction over all the most important controversies in the nation, that arise between others than citizens of the same state. They are inferior to the Supreme Court of the United States, but to no other courts. They are courts of limited jurisdiction, it is true ; not limited to trifling matters, but to those great questions, which may arise between citizens of different states, and some other cases, where it was supposed jealousies might exist, if the creditor was confined to the courts of the state in which his debtor resided. But, within those limits, they have as uncontrolled jurisdiction, as any courts whatever, both at law and in chancery.

But the effort to establish this doctrine in this case could avail nothing, even if the doctrine were correct. For the replication has averred all those matters, which show that the circuit court had jurisdiction to render the judgement now in controversy ; and which shows the defendant to have chosen his own jurisdiction, and called the present plaintiffs before that court as defen-

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dants, and that they appeared and made a successful defence.

But the defendant further contends, that the new matter introduced into his rejoinder, that the suit was brought by one Van Ness, without the knowledge or consent of him, the defendant, absolves this defendant from the force of this judgement. We decided otherwise in the case of *Tichout vs. Cilley*, in Chittenden county.* We there decided, that, so far as related to the bill of costs, recovered against the plaintiff, he was at all events liable to the defendants; that his liability is so fully established by the record, that it can not be controverted in the collection of the bill of cost. But it might be otherwise with regard to any thing done under the execution, like taking the property of some third person on the execution. But it would not be very direct justice to drive these plaintiffs to prove, by evidence *aliunde*, that the present defendant, the then plaintiff, brought his own action.

The defendant further contends, that his rejoinder traverses the most important part of the replication. If it were so, it only traverses the very fact established by the record, and the very fact established for the plaintiffs, on the plea of *nil tiel record*. Moreover, this averment in the rejoinder under the *absque hoc*, was not to be treated as a traverse. The new matter, introduced by the defendant into his rejoinder, was the only matter to be met by the plaintiffs. The defendant concluded his rejoinder with a verification, and the plaintiffs might either traverse this new matter as false, or demur to the rejoinder as immaterial. He chose the latter. And we consider the rejoinder clearly insufficient.

What is already observed leads to the necessary result, that *nil debet* is not a good plea to this judgement. It was to carry before the jury the verity of the record, in a case where the record is in law absolute verity, and only to be tried by the inspection of the Court.

The judgement of the county court is affirmed.

* See 3 *Vt. Rep.* 415.

LAURA CLARK vs. GILES HARRINGTON and JOHN MCGREGOR. GRAND-ISLE,
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Under the plea of *not guilty* in *trespass*, and notice of a former recovery by the defendant in a suit for the same cause of action, the proof must be such as would support a good plea in bar, if pleaded specially.

The action of *trespass* for the actual taking and carrying away of personal property is not barred by the defendant's having recovered judgement in a suit brought by the same plaintiff for the same property, commenced before the actual removal of the property, the first attachment being upon a writ against a third person.

Several actions will not lie for different parcels of goods taken at the same time.

Action of *trespass* for taking and carrying away 800 pieces of pine boards and five hogs. Plea, *not guilty*, and notice that defendant would give in evidence a former recovery by him in a suit brought by the plaintiff for the same trespass. On the trial in the county court the following facts were proved :

On the 15th day of April, 1829, *Harrington* sued out a writ of attachment against one *Tracy*, on which the property in question was attached, but was not removed by the officer at the time of attaching. On the 17th of the same month the plaintiff commenced an action of trespass against the defendants for the boards, before a justice of the peace ; between which time and the 27th day of the same month, the day on which the trial was had, the property attached was removed by *McGregor*, the officer. On the trial of the cause before the justice, several pleas in abatement were pleaded, and all overruled, and the parties proceeded to trial on the plea of not guilty. The defendants contended they were not liable in trespass, inasmuch as the property was not removed when the suit was commenced, though it did appear the property was removed in pursuance of the attachment. The magistrate was of opinion that the attaching of the property without removal, was not a trespass, and that the removing of it after service of the writ was an act of which he could not take cognizance in that trial, and accordingly rendered judgement for the defendants. The plaintiff afterwards commenced the present action.

The plaintiff contended that the defendants could not take advantage of the former judgement under the general issue and notice. But the defendants insisted that the judgement in the former suit would bar the right of the plaintiff to sue for the hogs, though they were not named in the writ. The court were of opinion that the plaintiff ought not to recover. The plaintiff excepted, and the case was reserved for the opinion of this court.

Mr. Brown, for the plaintiff.—It is contended that the judgement proved is not a bar to the present action. Where the real

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merits of the action have not been at all inquired into in a former proceeding, issue may be taken on the fact ; the judgement being pleaded in bar.--1 *Stark. Ev.* 199 ; 2 *Black. Rep.* 827 ; 3 *Wils.* 304. In this case issue was taken on the fact whether the merits of the present action were inquired into in the former proceeding. The case shows they were not. The inquiry was not to whom the property belonged ; but the only question submitted was, whether the plaintiff could maintain the action of trespass before the property was removed. The object of the present action is to ascertain to whom the property belongs. The facts necessary to try the title to the property were not in issue at the former trial, nor were they in any way the grounds of adjudication, or essential to the finding of the former judgement. The effect of the former judgement, if it is to have any effect, is conclusive ; hence the necessity of the grounds of adjudication being certain, and that the real merits of the present action appear from the records of the former judgement. The real merits of the present action were not inquired into ; and as the former judgement can be conclusive only of those facts which were litigated, and as no issue was taken in the first action upon any precise point, which is necessary to constitute an estoppel, the former judgement can not be a bar. In suits before justices of the peace the pleadings are seldom in writing ; and it would be dangerous to establish the principle that their records should conclude parties when it clearly appears that the merits of the cause were not tried. The case shows conclusively that the trial before the magistrate was not upon the merits. The only point decided was the effect of the attachment. When the suit was commenced and the writ served, the goods were in the possession of the plaintiff, and the attaching the goods was not a trespass. The court should have directed a non suit and the judgement rendered in the case amounts to nothing more. It appears from the case, that the defendants attached the goods and chattels described in the writ, as the property of Gardner Tracy. This was the real question between the parties ; but the justice turned the cause upon the time when the trespass was committed. It can not be contended that such an adjudication is conclusive upon the plaintiff. The plaintiff ought not to be barred by the judgement, because the trespass complained of was in fact committed after the suit before the justice was commenced.

Trespass to personal property can not be supported unless there is an injury of the goods in the possession of the owner, or an ac-

tual taking of the goods out of the owner's possession.—1 *Chit. Plead.* 169 ; 1 *Swift's Dig.* 527. Where grain, hay, &c. are attached, and a copy left in the town clerk's office, the attachment is a lien upon the goods, and the property may be said to be in the custody of the law. The officer is presumed to be in possession, and may maintain trespass against any person who should take away the property. But where goods are attached in the ordinary way, the officer has not the custody of the goods, nor has he in any way changed their situation. Hence no such presumption arises, and no action can be maintained by him against any person who shall take away the goods. At the time the first action was commenced the plaintiff was in the actual possession of the property ; and if she was the owner, the attachment, having no effect whatever upon her title, did no injury to her right of possession ; and there would be some difficulty in the plaintiff's maintaining an action of trespass, until the defendants had done some act that affected either her possession or her right of possession to the property sued for. It may be said the attachment was an incumbrance upon the property, and, therefore, an injury to the rights of the plaintiff, for which the action would lie. Attaching the property of the plaintiff as the property of Tracy, without taking it into custody, or changing the possession, could create no lien as against the plaintiff ; and it is strange logic by which it can be proved, that an attachment which gives the creditor no lien upon the goods for his debt, is an incumbrance injurious to the owner. If an action would lie for attaching personal property without taking possession, much more had it ought to be supported in an attachment of real estate, where the incumbrance might be a serious injury ; but to permit such actions would open a wide field of litigation.

Removing the property after the service of the writ, could not enable the plaintiff to maintain a suit or aid her in recovering a judgement. Her right of action must exist, and be complete, at the time of the commencement of the suit. If she could have recovered in that suit, she could as well have recovered if the property had not been removed at the time of the trial. What then would have been the rule of damages? The property would have been still in the plaintiff's possession. The defendants might never remove it ; or she might have placed it beyond their reach, so that they could not have taken it. The rate of damages could not have been the value of the property, but the injury to the right of possession occasioned by the attachment. Had the judgement

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been for the plaintiff to recover for the injury occasioned by the attachment, she would have a right of action for the subsequent injury occasioned by removing the property. The injury occasioned by the attachment (if any) was consequential, and would not support an action of trespass, which depends upon force, actual or implied. The making of a copy of a writ, and leaving it with Tracy, with a return on it that he had attached the goods in question as his property, can not be an injury to the plaintiff, with force and arms.

Mr. Harrington, for the defendants.—There are three questions for the determination of this Court. 1st. Whether a former recovery for part of one entire trespass, is a bar to an after suit for the same trespass; 2nd. Whether a former recovery can be pleaded under the general issue and notice; and, 3rd. Whether the county court did right in receiving parol evidence of what the defendants contended for under the plea of not guilty, and the reasons on which the justice gave his judgement, here pleaded in bar.

1. It is contended that the first suit operates as a legal and perpetual bar to this and all other suits for the same trespass, whether the whole trespass or a part was declared for in that suit. 1 *Sw. Dig.* 533, 752-3. This we take to be the rule in England, and through the United States. But in this state we have strong reasons for adhering to such a rule. Suppose A attaches the goods of B, to the value of \$1000, and C claims them as his property; but not willing to risk the whole in one suit, brings a suit before a justice for such articles as are worth less than \$10, and recovers, and continues to bring suits in the same manner until the justice has brought within his jurisdiction and tried a thousand dollars trespass, and made \$1000 costs, and A is bound to submit, owing to the final jurisdiction of the justice for sums less than \$10. It is believed if no rule has been established in this state, as laid down by Judge Swift, it is high time there should be, both for the same reasons that have governed other courts, and that our statute renders such a rule essentially necessary.

2. The statute (p. 88) fully and clearly authorizes this method of pleading a former recovery. The words of the statute are too conclusive to admit of a doubt.—*Rice vs. Pollard*, 1 *Tyler*, 230; 1 *Sw. Dig.* 614, 615; *Barney vs. Goff et al.* 1 *Chip. Rep.* 304; *Lyman vs. Dorr et al.* 1 *Aik. Rep.* 217.

3. The facts set forth in the case which shows the reasons on which the justice gave his judgement, were facts improper for the

county court to inquire into, and ought to be laid out of the case. They must have been drawn from the magistrate. No court can swear up or down their records. If either party wish the records more full, they may apply to the court and obtain that object. To suffer a justice to swear, would tend to defeat our most sacred rights. The case shows that the judgement of the justice was upon the general issue, and that pleas in abatement were previously determined. The finding of facts by the court are precisely as if found by a jury. It is by agreement of the parties that the court may find the facts, and render judgement upon them. No distinction can exist in this respect between the county court and a justice's court. If there should be a difference it would destroy the analogy of the law. The principles must be the same in either court. And if so, it would follow, that if the justice could be a witness to the reasons on which he gave his judgement, why not call on the by-standers and prove that the justice reasoned incorrectly from the evidence? And why not call on the jury, in case of jury trials, and prove by them the reasons for their verdict? By the statute it would be impossible for any other court to reverse, correct, or in any way examine into, the judgement of a justice by any process whatever. And if the county court could not inquire into it in any way, either "by a writ of error, *certiorari*, or any other process whatever," it must be very idle to inquire what that judgement is made up of.—*Stat. p. 126, sec. 7.* This case sets forth that the defendants contended before the justice, that as the property was not moved when the plaintiff took out her writ, they were not guilty. But it appears that the property was taken by serving the writs upon it previous to the date of her writ, and removing it before her court, in pursuance of that attachment. Now can it be material to the validity of a judgement, whether the party contends for legal principles or not? It would be very strange that that should make the judgement void or voidable, or even affect it in the least, after judgement rendered, recorded, and not appealed from. Attaching property is all the act necessary to make the plaintiff and officer liable in trespass. The property by attaching is placed in the custody of the law, and is out of the custody and the control of the owner. He could not oppose the officer or his receipters moving the property whenever they would, until the attachment is dissolved.

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HUTCHINSON, C. J., *pronounced the opinion of the Court.*—

This is an action of *trespass*, to which the defendant pleaded the general issue, and gave notice in writing, according to the provisions of the statute, that he should give evidence, under said plea, that the plaintiff heretofore brought an action of trespass, for the same cause of action, and on trial the defendants recovered judgment for their cost. The issue was joined to the court, and they found, and placed upon the record, a special statement of facts, upon which said county court decided in favor of said defendants. To which the plaintiff excepted, and brought the case up to this Court. The only question presented is, whether the facts found by the county court furnish a good bar to this action. For, admitting the defence correctly presented by a special notice under the general issue, yet the facts must be such as would prove a good plea in bar of a former recovery. Such plea, if made, must set forth the former action and decision therein, and aver, that the subject matter of the said two actions was one and the same; and that the merits of the said first action were adjudicated and decided. And, if such a plea is traversed by a plea of *nul tiel record*, the record only is necessary to prove the plea. But the plaintiff may now assign, and show, that he relies upon a different trespass from that which the defendant justifies, or he may traverse the allegation of the cause of action being the same in each suit. In either case, parol testimony is necessary, and clearly admissible on the issue, which brings in controversy the question of the identity of the two causes of action. Such was clearly the character and object of the parol testimony, which the county court must have heard in order to have found the facts, which they have put into this case. How far, then, would these facts prove a good plea in bar, if such had been specially pleaded? It is clear, that both actions were brought for the taking of the same boards. And the defendant contends that both were for the same taking. The facts were, that the defendants attached the property in question on the 15th of April, by virtue of a writ, that was not against the plaintiff, but did not remove the same from the place where they found it. The plaintiff brought her action for it on the 17th of said April, the court to be on the 27th of the same month. After the commencement of the action, and before the day of trial, the defendants carried away the property. And for this carrying away, the present action was brought; and the plaintiff failed in the first action, because it was brought before there was any actual carrying away of the property. The question raised in this

action could not have arisen in the first, unless upon the ground, GRAND-ISLE,
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that the carrying away of the property, after the commencement of the action, should be considered to have relation back to the first attachment, and be treated as if then done. This would be difficult, unless there was an actual taking possession at the first attachment, or leaving a copy with the town clerk, which was not done in this case. For aught that appears, the officer may have done what he returned as an attaching of this property, and *might* so return, if about to follow it up with immediate removal, and it might be no such meddling as to be a trespass upon the plaintiff, till actual removal; as the writ was not against the plaintiff. The defendants might even have been liable to an action of trespass for breaking and entering the plaintiff's close, and yet not been liable to an action of trespass for any thing they did to this personal property. Now, if any such thing could have existed, and yet the defendants not liable in said first action, such a state of things should now be presumed, after a decision of the first suit in favor of the defendants, upon the plea of not guilty. That very decision carries with it the fact, that no trespass was committed, when the action was commenced. This decision would be correct, if the officer, in serving his writ upon Tracy, merely made an ideal attachment of this property of the plaintiff, and never in any sense got it into his custody till after he was sued. And such we must now presume was the case: for otherwise, it is very improbable, that the plaintiff would have failed in her first action. The facts, presented, show, that this suit is brought for that unequivocal trespass, which clearly entitles the plaintiff to recover the value of the property taken. This suit, then, must not be barred, by reason of the defendants having recovered in the other action which was commenced before this carrying away of which the plaintiff now complains. The defence set up in this case is so technical, and savours so little of equity, that it ought not to prevail until made out in the most conclusive manner. And the act of carrying away of the property now complained of may be viewed as distinct from the first attachment. Suppose the defendants had let the property remain as it was till after the trial in the plaintiff's first suit, and the plaintiff failed to recover for want of proof that the defendants had intermeddled to her injury, and, when that trial was over, the defendants carried off the property, could it be suspected, that the plaintiff was left without remedy for this last taking? Or, if the plaintiff had recovered nominal damages for the first taking, and that only, because the property

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yet remained in the possession and under the control of the plaintiff, could the defendants, after that, carry away the property, and the plaintiff be left without remedy? The actual carrying away must be literally a continuance of the first taking, or so unjust consequences must not follow.

A suggestion has been made, that the present action is brought for some swine, not included in the first suit, but attached and taken with the other property. This does not vary the case, as it respects the bar of the action; and the plaintiff's counsel seem not to urge it at all.

The judgement of the county court is reversed, and judgement is rendered for the plaintiff upon the facts contained in the case. WILLIAMS, J., dissenting.

Harrington, for defendant.

Brown, for plaintiff.



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1831.

HEMAN LOWRY vs. PHILIP WALKER.

Parolevidence is admissible in *trover* against a third person, to show that an execution was delivered to the officer who served the attachment, within thirty days from the rendition of the judgement.

Such third person cannot be permitted to question the regularity of the judgement of a justice of the peace, through want of continuances, or the giving of bonds as the law requires, while the execution is not set aside by regular process.

When an officer attaches personal property, such as hay, and leaves copies with the town clerk as the statute provides, the attachment gives him sufficient title and possession to maintain *trover* against one who has converted the same property.

The defendant, in such case, is only liable for the property he has actually converted, or over which he had some control, when he forbade the officer's selling it.

This was an action of *trover* for 150 tons of hay, 150 shocks of wheat, and 100 shocks of oats. The defendant pleaded *not guilty*, and the issue was joined to the country. The plaintiff obtained a verdict for his full damages; and the case was brought up to this Court on exceptions taken by the defendant on said trial. The material facts, disclosed in the exceptions, were these: The plaintiff, as sheriff of the county of Chittenden, attached the property in question, by virtue of several writs of attachment, some of which were made returnable before a justice of the peace, and one was made returnable before the county court. The property was not moved by the plaintiff, but copies left with the town clerk. These writs were in favor of several creditors, and were all against one Elihu C. Barber. Judgement was rendered in all these suits, and the creditors took out their executions, and de-

livered them to the plaintiff, to be levied on the property attached. The plaintiff advertised the property for sale ; and, on the day of sale, the defendant pretended he had bought it of Barber, and forbade the plaintiff from selling it. The defendant's counsel did not insist upon any title in the defendant by virtue of this sale. It also appeared, that the defendant had taken a part of said property into his possession, and converted it to his own use. But it did not appear that he had any control over, or actual possession of, the remainder. It did not appear, that the defendant had had personal notice of said justice's suits, nor that any continuances were had to give him notice, nor that any bonds were given before the issuing of the justice's executions, as required by statute, where the defendant is out of the state ; nor was there any minute made by the plaintiff on said county court execution of the time when the same was delivered to him : but parol evidence was admitted to prove this. The defendant contended, that the plaintiff could not maintain the action for want of actual possession of the property ; and that if he could recover at all, it must be only for the property actually converted by the defendant. Upon all the questions raised, the court instructed the jury in favor of the plaintiff, and exceptions were taken by the defendant to all the decisions made on said trial. The jury returned a verdict for the whole claim of the plaintiff. These exceptions were argued at this term.

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C. Adams, for the defendant.—1. Leaving a copy at the town clerk's office does not amount to any taking of the property.

2. Leaving a copy may create a lien which will bind the property against subsequent sales or attachments, but creates no other right.

3. Plaintiff had no sufficient interest in the goods attached to enable him to sustain this suit.—*Chit. Pl.* 150 ; *2 Esp. N. P.* 182 ; *Wilbraham vs. Snow*, 2 *Saund.* 47.

4. The forbidding the sale, was not a conversion.—*Chit. Pl.* 157 ; *6 Bac. Ab.* 679 ; *Isaac vs. Clark*, 2 *Mod.* 245.

5. The executions were improperly admitted.—*Statute*, 129 ; *Statute*, 213.

Bailey and Allen, for the plaintiff.—I. The first question made by defendant is, whether the plaintiff has lost his lien on the property attached at the suit of Emerson and Orvis by neglecting to indorse on the execution the time when he received the same.

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1. This objection to the plaintiff's recovery is founded on the 10th section of the act directing the mode of levying and serving executions, (*Comp. Laws*, p. 213,) which prescribes that, "every sheriff, constable, or other officer, to whom any execution shall be delivered, upon the receipt of the same, shall, without fee, endorse upon the back thereof, the day of the month and year, when he received the same. And, if two or more executions shall be delivered against the same person, that which was first delivered shall be first satisfied." It is observable that this act relates wholly to the service of executions, and contains no reference whatever to attachments. The latter clause of the section is a key to the object of the whole. The design of the section is to secure a priority of service to the execution first delivered, and the first clause is introduced for no other purpose than to ensure the execution of the latter. It is merely intended to provide a method of establishing the priority of right between different executions. It is directory to the officer, and the statute has annexed no forfeiture to its non-observance.—See *Bealls vs. Guernsey*, 8 *Johns. Rep.* 41, where this point is expressly decided.

2. The files and papers made a part of the case, show, that the judgement in favor of Emerson and Orvis was not rendered until after the commencement of plaintiff's action, and the entry thereof in court ; and the cause must be tried upon the facts as they were either at the time of the service of the writ, or of joining issue, and the defendant certainly cannot under this plea avail himself of a defence which arose after the pleadings were closed. Had the cause been tried at the term when issue was taken on the plea, no such question could have arisen, because the thirty days had not then expired. The right of the plaintiff at the time of the conversion was perfect, nor had it been defeated, if at all, at the time the issue was taken ; and as the defendant claims no right, he cannot now question that of the officer. As against a wrong doer, it is enough if the plaintiff has *scintilla juris*, and this he has by reason of his responsibility to the principal debtor, even if the lien would have been lost as against a *bona fide* purchaser.—*Gibbs vs. Chase*, 10 *Mass. Rep.* 125 ; *Whittier vs. Smith et al.* 11 *Mass. Rep.* 211. Indeed, original plaintiffs need not have taken out execution at all.—*White vs. Bagley*, 7 *Pick.* 288 ; *Cooper vs. Mowry et al.* 16 *Mass. Rep.* 5 ; *Jenny vs. Rodman*, 16 *Mass. Rep.* 464 ; *Burrows vs. Stoddard*, 3 *Conn. Rep.* 431.

II. Can the officer maintain trover without having removed the goods? The statute (*Comp. Laws*, p. 107) provides, that an attachment by leaving a copy, &c., "shall be as effectual to hold said property, against all subsequent sales, attachments, or executions, as if said property had been actually removed, and taken into the possession of such officer." These general words seem intended to put the attachment on the same footing as those made in the ordinary mode by removing the property. The act describes the property as "subject to waste by removal," and was doubtless intended for the benefit of the debtor, and not for the convenience of the officer. It could not have been to abridge the right of the officer to control the property so attached; and if not, it cannot be supposed the legislature meant to change the mode of enforcing that right. Suppose property so attached is eloiigned by one, without right; must the officer be left to his remedy, by special action on the case, against the *tortfeasor*, who, perhaps, may be wholly irresponsible? and may he not rather, as in other cases, enforce his lien by a re-capture of the property? The officer must have the right to convert his constructive possession into an actual one at any time; and all the act has done is to change the *indicia* of his possession. In ordinary circumstances, a change of the legal possession of personal property is evidenced by its removal, and a removal is necessary only for the purpose of giving greater notoriety to the transaction. In this case the act has provided a different mode of giving notoriety to the attachment. But providing a new mode of establishing a right does not take away that right. If by the attachment the officer acquires a right of reducing the property into his possession, he may maintain trover against any one who interferes with that right.—*Merrill vs. Sawyer and Bryant*, 8 *Pick.* 397; 2 *Phil. Ev.* 118; 1 *Chit. Pl.* 151-2; *Fowler vs. Down*, 1 *B. & P.* 45; 6 *Bac. Ab.* 682.

III. Upon the question, as to the sufficiency of the evidence to show a conversion of the whole property, we cite, *Gibbs vs. Chase*, 10 *Mass. Rep.* 125; *Bristol vs. Burt*, 7 *Johns. Rep.* 254; *Baldwin vs. Cole*, 6 *Mod.* 212; 6 *Bac. Abr.* 679; *Richardson vs. Atkinson*, 1 *Strange*, 576; 3 *Starkie's Ev.* 1493; 2 *Esp. N. P.* 191.

IV. A further question is, whether the lien is lost, as to those attachments where judgements were taken without a continuance or bail for review. It is sufficient to observe on this point, that the case does not show (nor was such the fact) that Barber was

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out of the state, at the time the writs were served ; and this the court will not presume. But were this otherwise, the defendant in this action, being a *tortfeasor*, could take no advantage of the neglect of plaintiffs in this action. The executions were regular in point of form, and the officer was bound to execute them, by levying them on the property he had attached. He could not know, nor would he have a right to inquire, whether notice was proved to the court ; and in an action against him by the original plaintiffs for neglecting to levy the executions, he could not show a want of notice to a judgement debtor as a defence,—(6 *Bac. Abr.* 166.) Being, therefore, bound to levy upon the property, he may maintain an action against any one who, without right, prevents him from discharging that duty.

HUTCHINSON, C. J., *pronounced the opinion of the Court.*—The first question raised upon the record is, whether it was competent for the plaintiff, whose duty it was, on receiving the execution, to enter thereon the day, month and year, when the same was delivered to him, to prove the same by parol testimony ? There seems to be no difficulty in this question, in the present case, for the plaintiff's lien upon the property was established by his service of the attachment. This lien must remain in the officer for the benefit of each creditor, so long as such creditor pursues his lien, created by the attachment. When the lien of the creditor is off, the sheriff holds for the benefit of the debtor. The defendant, in this case, does not even contend that he has made out such a purchase from Barber, the original debtor, as to stand in his right, and hold where Barber might hold. He stands a stranger to title, and has no right to call in question what might be litigated by the creditor and debtor. The plaintiff is liable to one or the other, and, as between these parties, it is unimportant whether the execution were delivered to the officer within thirty days from the rendition of the judgement, or at a later period. This first exception of the defendant is overruled.

The same reasoning will dispose of the question in regard to the regularity of the several executions issued from the justice courts. If the creditors lost their lien by not pursuing with regularity, that results in the revived right of the debtor, and the plaintiff would be liable to him. This objection cannot avail the defendant. Even Barber himself ought not to be permitted to treat these executions as irregular and void, before instituting some process to set them aside. If the court never had jurisdiction, the execution

would be void of course ; but, when the action is once regularly before a court of competent jurisdiction, so gross an irregularity as to render the after proceedings void, is not to be presumed merely from a defect in the record, to show a notice proved, or actual appearance of the defendant. On a writ of *audita querela*, or motion to set aside the execution, the fact of notice may be enquired into. If either of these prevail, the creditor may set out anew, and pursue his claim with regularity.

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The defendant further objects, that the plaintiff has no sufficient title or possession to recover in this action, because he never moved the property from the custody of Barber. The Court, however, consider, that the leaving the copies with the town clerk, according to the provisions of the statute, has the same effect to create a lien, or a right of action, as an actual removal of the property would have had. The attaching officer has the legal custody, after leaving the copies, of such property as this, during the pendency of the suit, and he alone can maintain an action for it, for the benefit of the attaching creditor.

With regard to the extent of the plaintiff's claim, the instructions given to the jury were as follows, to wit : " That if the defendant intermeddled with the property, by taking a part of it, or forbidding the sale by the officer, it was a conversion of the whole ; and, in that case, he would be responsible to the amount of all the claims, provided the same did not exceed the value of the property, alleged to be converted by the defendant." We think the instructions upon this point incorrect, unless the proof had gone further, and shown, that the defendant had, in some way, some control over the property, such as standing upon timber, in one case cited ; or having soldiers around him to aid him in keeping the property, as in another case cited. The defendant is only liable for what he was proved to have actually converted, or to have taken some control over, more than merely to forbid the officer to sell.

For this incorrectness in the charge, a new trial is granted.

C. Adams, for defendant.

Bailey & Marsh, and H. Allen, for plaintiff.

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DANIEL STANIFORD, *vs.* THADDEUS TUTTLE.
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The statute of limitations bars claims in equity as well as those at law.

Where a demand is necessary to perfect a claim, the statute only runs from a demand made.

Such demand may as well be presumed, as any other fact, from lapse of time, and such dealings between the parties, as render it very improbable, that the claim could have been forgotten while it was worthy of any consideration.

The presumptive bar attaches, in twenty years, where there is nothing proved to remove it : and especially where the transactions, proved, tend to aid the presumption.

The orator, in his bill of complaint, claimed an account of the defendant's agency, undertaken, as the orator averred, for the joint benefit of the orator, the defendant, and one John Fay, now deceased, in relation to certain lands, to which they had a joint claim, but of which their title needed confirmation ; and alleging that *Tuttle* was to take care of these lands, and procure vendue titles, or other titles, in confirmation of theirs, as by a stipulation in writing signed by *Tuttle*, and dated March the 12th, 1803 ; and averring, that the defendant had received titles to lands, and monies, for the joint benefit of the three, and yet, though requested, refused to render any account of his agency, or to pay over the monies so received, or transfer the titles so received—and prayed for an account, and general and special relief.

The defendant pleaded the statute of limitations, declaring that the cause of action, if any ever accrued to the orator, accrued more than six years before the commencement of this suit ; and denied that he ever promised to account with the orator within that time. He also pleaded, that more than twenty years had elapsed since any claim had been set up by the orator under said contract, adding the appropriate averment.

The defendant also answered the same thing, and alleged that various dealings, lawsuits and settlements had existed between him and the orator ; and he presumed all these matters settled more than twenty years before the commencement of this suit, and insisted upon the presumptive bar.

The answer was traversed by the orator. And he produced the testimony of Mr. Crame, the subscribing witness to the written contract of March 12th, 1803, which sufficiently proved the execution of the contract, which the defendant neither admitted nor denied in his answer.

The defendant, in order to aid the presumption, on which he

relied, produced the following deeds, or copies of deeds, from the record, which were read without any objection. One from Samuel Hitchcock to the defendant, the orator and said John Fay, dated November 20th, 1805, of one whole right of said land ; also a deed from the orator to the defendant, dated December 3d, 1805 ; also a deed from said Fay to the defendant, of the same date : each of these deeds conveyed some part of the lands in question. The defendant also produced, and proved, copies of five notes given to him by the orator, and dated in the year 1799, payable at different times : one payable in April 1803, and one payable in November, 1805, with an indorsement thereon of payment, dated in January, 1806.

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The present bill of complaint was entered in Court at the term in January, 1825.

Bailey & Marsh, for orator.—1. From the nature and objects of the contract between *Staniford, Tuttle* and *Fay*, as they appear on the face of it, a considerable length of time would evidently be necessary to enable *Tuttle* to carry it into complete execution. No period was limited within which he was required, or could be expected, to fulfil the duty which he had undertaken. The parties could not determine by what day or year, *Tuttle* could perfect or strengthen their titles to the lands in question, or “extinguish adverse claims by purchase, or advantageous compromise.” Under these circumstances, no right of action could accrue till after a demand, and refusal to account to *Staniford* and *Fay*, or to release and give up the possession to them of their share or portion of the lands. No facts are charged in the bill or set up in the answer, which show that a cause of action existed in the orator or *Fay*, or the heirs of the latter, *fifteen* or *sixteen* years before the bill was filed.

2. But this is the case of a *trust*. *Tuttle* was to hold the lands, and to endeavour to accomplish certain objects, for their *joint benefit* and *use*. His possession was the possession of *Staniford* and *Fay*. The trust, too, was created by the act of the parties. It was one of which a court of equity has exclusive jurisdiction, there being no adequate remedy at law.

3. The statute of limitations does not attach to a *trust*, especially, if it be created, not by operation of *law* merely, but by *the act of the parties*. Nor can a trust estate be affected by a presumptive limitation, or the lapse of time, as between the trustee and the *cestui que trust*.—*Hovenden vs. Lord Annesley*, 2 Sch.

CHITTENDEN & *Lef.* 633 ; *Chalmondley vs. Clinton and others*, 2 *Mer. Rep.* 356-7 ; *Hopkins vs Hopkins*, 1 *Atk.* 581 ; *Decouche vs. Savetier*, 3 *J. C. Rep.* 190, 215 ; *Ram vs. Bloodgood*, 7 *J. C. Rep.* 421 ; *Sug. Vend.* 270-2.

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There may be a *seizin* of an *equitable* estate, but there can be no *disseizin* of it—or, as it is said in *Grenville vs. Blythe*, 16 *Ves.* 224, there cannot be an *equitable* *disseizin*. A *disseizin* must be of the *entire* estate, and not of a limited or partial interest in it—and a *tortious* act cannot possibly be the foundation of an *equitable* title. “On a trust in equity, no estate can be gained by *disseizin*, *abatement*, or *intrusion*.”

The proposition that, as between the *trustee* and the *cestui que trust*, the estate or interest of the latter is not subject to the statute of limitations, is one in which both reason and authority concur. The only qualification of which the rule admits is, that, in some cases, where the party might have had a complete and corresponding remedy at law, this Court will, in analogy to the period limited by law for prosecuting the claim, hold the action or suit to be barred. But in this case, a court of law could not give adequate relief. It could not compel the parties to execute conveyances and releases, nor could it make and enforce the necessary orders for the adjustment and final settlement of the matters in controversy. On no principle, then, can *Tuttle* refuse to render an account of what he has done with the lands in pursuance of his agreement ; and, if he has not fulfilled, to surrender and give up, so much of the estate now in his hands, as belongs to *Staniford* and the representatives of *Fay*.

C. Adams, for the defendant.—1. Nothing is stated in the bill to bring the subject within the cognisance of this Hon. Court. It is stated that the orator and defendant were tenants in common of the land ; but this is not admitted by the answer, nor is there any proof to that point. It is also averred, that *Tuttle* agreed to take charge of the land, and, so far as the bond may be considered as evidence, this fact may be established : but it is not alleged, neither does it appear, that *Tuttle* ever entered upon the land, or took any charge thereof, or that he has ever made any disposition of the same, or of any part of it. It is not alleged that orator ever executed any conveyance of his interest in the land to *Tuttle*, or that any thing has ever come into the hands of *Tuttle* for which he ought to account. It is then the common case of an undertaking to do certain things which the defendant has neglected to

do, and for which the orator may have a remedy at law. There is nothing in the cause to render it a legitimate object of inquiry in a grave Court of Equity. No title is shown in any of the parties, and it is quite evident from the bond, that these pioneers of civilization had it principally in view to obtain a title by some of the methods usual in those days. And we submit whether it will not be more consistent with the dignity of this Court to leave the parties to prosecute their legal rights, if they have any, than to become arbiters between them in the division of their spoil.

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2. The answer is a denial of all equity in the bill. The answer, it is true, is very general, and so is the bill. It fully shows, however, that there is no equitable claim on the part of the orator. The answer admits nothing that is charged in the bill, and on the traverse nothing is proved excepting the execution of the bond. Nothing can be inferred to establish any equitable claim ; and from aught that appears, a court of law, if they awarded damages at all, could only give nominal damages. It is in vain to say that *Tuttle* must account. Nothing has ever passed into his hands ; he has never done any thing, and has nothing of which to render an account. It cannot be contended that the defendant, by neglecting to answer any particular charges in the bill, therefore admits them. This would be a proposition without any authority to support it. If the answer is not sufficient, the plaintiff may except and compel defendant to give a more definite answer ; but if he does not except, the answer is admitted to be sufficient ; and nothing can be considered as established unless it is admitted by the answer, or proved by the testimony. But nothing is charged in the bill except the joint ownership of the land and the undertaking of *Tuttle*, to take care of it ; and from this no equitable claim can be inferred.

3. But we contend that if any claim ever existed, it is barred by the statute of limitations. The defendant both by plea and in his answer claims the benefit of the statute. That the statute of limitations is a good plea in this Court, as well as at law, is established by every elementary writer, and by numerous adjudged cases. *Mitford*, 212 ; *Cooper*, 251 ; 2 *Mad.* 308 ; *Wych vs. E. T. C.* 3 *P. Wms.* 309 ; *Lawn vs. Lawn*, 2 *Atk.* 295 ; *Earl Strafford vs. Blakemay*, 3 *Br. C. C.* 305. The Court will not sustain a bill to redeem after twenty years possession by mortgagee.—*Mitford*, 213 ; *Cooper*, 254 ; *Aggles vs. Pickerell*, 3 *Atk.* 225 ; *Edsell vs. Buckannar*, 4 *Bro. C. C.* 254. In *Smith vs. Clay*, 3 *Bro. C. R.* 639, the Court refused a bill of review after twen-

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years. A prescription of twenty years will bar right of common.—*Denton vs. Jackson*, 2 J. C. R. 338.

4. There is no circumstance connected with the case to take out of the statute. It is sometimes said that a trust is not barred by the statute. It was contended by the solicitor general in ***** Briggs*, 3 Atk. 105, and not disputed, that it must be a clear trust not depending on any account which the court would consider as a trust to be taken out of the statute. But there is nothing in the bill, nor in the proof, to show that *Tuttle* was ever a trustee. One cannot well be called a trustee when nothing has passed into his hands. A trustee without a trust is a solecism.

5. Even if the statute of limitations as such could not be pleaded, the Court in the exercise of a sound discretion will adopt the rules of law and apply an equitable bar. *Expediit reipublice ut finis litium*, is the maxim of equity as well as law. Lapse of time has ever been considered an equitable bar.—*Day vs. Denton*, 2 Johns. C. Rep. 191; *Deloraine vs. Brown*, 3 Bro. C. R. 33. They have gone so far as to apply it when there could be no presumption of any payment.—*Hercy vs. Dinwoody*, 4 Bro. C. R. 257.

6. After such a lapse of time the Court will presume that the claims of plaintiff, if any, have been satisfied and paid.—*Jones vs. Tuberville*, 2 Ves. Jun. 11. All statutes of limitation proceed on the presumption of payment. Courts of equity, as well as courts of law, favor the vigilant, and they who sleep upon their rights have no claims upon the aid of this Court. This is a stale demand of more than twenty years standing, and no reason is offered, and none can be offered, for this extraordinary delay. The relative situation of the parties in times past, forbids the possibility of any claim. From the facts disclosed in the answer, the conclusion is irresistible that all claims must have long since been adjusted and settled, if any ever existed.—*Arden vs. Arden*, 1 Johns C. R. 316, *Ellison vs. Moffatt*, 1 J. C. R. 46; *Anon. vs. Mod.* 22; *Winchelsea cases*, 4 Bur. 1962; 2 *Starkie*, 309; 1 *Starkie*, 1090. A lapse of twenty years seems to be fixed upon as a presumptive settlement of all disputes. It quiets all demands, even those upon record. Bonds are presumed to be paid. Writs of error will not lie. Mortgages shall not be redeemed. Courts of equity will not allow a writ of review. A *quo warranto* will not be allowed. In the case of *Cooper vs. Humphreys*, 14 Sergt. & Rawle, it was decided that a lapse of twenty

years was an absolute bar ; that it was a question for the court, and that the jury had no discretion on the subject.

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HUTCHINSON, Chancellor, *pronounced the decree of the Court.*—The only questions, in this case, arise upon the plea of the statute of limitations, and the plea of the presumptive bar, resting upon lapse of time and other circumstances in evidence ; and upon the same matters presented and insisted upon, in the defendant's answer, which is traversed. These may as well be considered together, as to take a separate view of them. The contract, upon which the orator relies to show the agency of the defendant, bears date in March, 1803, and the complaint was first entered in court at the January term, 1825. So that more than twenty years elapsed after the making of this contract before the commencement of this suit. But the contract contemplated that the agency would continue for a period ; but how long does not appear. It might be understood to run but a few months or weeks ; and it might be understood to run for several years. Now the orator objects, that neither the statute of limitations, nor the presumptive bar, could affect him, till the agency was at an end, and a demand made. We therefore enquire, when did the agency close ? The orator has adduced no proof upon this point. He has not shown any titles or monies coming to the defendant for the joint benefit within twenty years before the bill or suit was commenced. The deeds, shown by the defendant to have been given to the three in November and December, 1805, make no items in any account but what balanced as it run. The deed from Fay to the defendant, in 1805, and the notes of the orator to the defendant, given in 1799, and existing, and payments upon them in January, 1806, are circumstances, that go in aid of the bar set up by the defendant. They also go in aid of lapse of time to raise the presumption, that, if the orator ever had any claim for the accounting now sought, he long since made a demand of the defendant to render that account ; so that the statute of limitations would run, as well as the presumptive bar of twenty years attach. Wherever a demand is necessary to perfect or mature a claim, that demand may be presumed from lapse of time and frequent deal between the parties, as much as any other necessary fact can be presumed from appropriate circumstances. It would seem incredible, that the orator and respondent should live in the same village, and the defendant have notes against the orator, upon which payments were made and indorsed, and the orator

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have his present claim against the defendant, and never request him to come to a settlement, till the statute had rolled over his claim more than three times, after the existence of the last item of the account, as exhibited in proof on trial. There is sufficient ground to presume a demand, and let the statute run against the claim of the orator ; and also to presume a settlement of any claim the orator ever had against the defendant, growing out of his agency created by said contract.

The decree of the court is that
the bill be dismissed, with cost.



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MOSES BLISS vs. ALBERT and ALONZO STEVENS.

When property is attached on *mesne process*, the delivery of the execution to the officer who made the attachment within thirty days from the rendition of the judgement, is a taking of the property in execution within the meaning of the statute, so far as respects the support of the lien of the creditor.

When property is attached by a sheriff's deputy, the delivery of the execution, within the thirty days, to another deputy of the same sheriff, and informing the latter deputy of the attachment, equally supports the creditor's lien ; the act of each deputy being, in a civil point of view, the acts of the sheriff himself.

When the creditor's lien is kept good, by delivering the execution to the officer within thirty days, a demand of the property of the receiptors, after the first thirty days, and in the life of the execution, is sufficient to charge them.

The production of an execution in such cases may be dispensed with by proof of its loss.

This was an action of *assumpsit* brought by the sheriff upon a receipt for property, attached by George A. Allen, a deputy of the plaintiff. The execution was delivered to Amos W. Butler, another deputy of the plaintiff, who made demand of the property of the receiptors in the life of the execution, but after the expiration of the thirty days from the rendition of the judgement. The case came up from the county court, upon a long bill of exceptions, taken by the defendants, against whom a recovery was had. The only questions now agitated were, whether the loss of the execution was sufficiently proved, and whether the property was seasonably demanded. The facts sufficiently appear in the arguments and opinion.

Bailey and Marsh, for the defendants.—There are two questions in this case ; *First*, Whether there was a taking of the property in execution, within the meaning of the statute, within the thirty days ; *Second*, Whether there was sufficient evidence of the

loss of the execution, to justify the court in dispensing with the production of it. CHITTENDEN,
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L. A taking in execution was doubtless necessary, for the language of the statute, (*Compiled Laws*, p. 68,) is very strong : Bliss
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“ And, unless the plaintiff in said suit shall within the term of thirty days, &c., *take the property in execution*, the same shall be discharged from said process, and be no further liable to answer said judgement than though the same had not been attached.”
The testimony of Mr. Porter was probably sufficient to show the execution into the hands of A. W. Butler, within the thirty days ; but there was no evidence of a demand upon either of the receiptors, or upon Allen, the attaching officer, within that time. In examining whether a demand was necessary, we are to consider, that the property attached went immediately back into the hands of the original debtor, (he being one of the receiptors,) and that, therefore, there is no liability on the part of the sheriff to him ; and if the attachment has been dissolved for want of a demand, the sheriff cannot recover on the ground of such liability, as he might have done, had the property gone into the hands of a third person, who refused to deliver it on demand.—*Knapp vs. Sprague*, 9 *Mass. Rep.* 258. The necessity of a demand upon the receiptors to constitute a taking in execution, in this case, appears from the consideration, that the property went back into the hands of the original debtor ; and that of notice to, or a demand upon, the attaching officer, or of a demand upon the receiptors by his authority, from the fact that the execution was not delivered to the same deputy, who attached the property, but to another deputy of the same sheriff.

1. Taking in execution, in the ordinary use of the words, imports an actual seizure. But it is said there may be a constructive taking. In England, the chattels of the debtor are bound from the delivery of the execution ; and it may well be doubted, whether the bare delivery of the execution here, has, under *any* circumstances, any greater effect on the property than in England. It certainly gives the officer no new right, no additional power over property, already in his possession by virtue of the attachment, except a power of sale. It does not create a constructive possession, unless there was an actual possession before. The right, which the sheriff has in England over the debtor's goods after delivery of the execution, and before seizure, is a mere naked lien, not coupled with any idea of a constructive possession ; a power to seize the property wherever he can find it ; but he cannot maintain trover or trespass for it *unless he has*

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first actually seized it. The English law, then, furnishes no analogies, whereon to found the notion of a constructive taking in execution ; and the only cases where it has ever been holden in this state, or other states where the practice of attachment is known, that the delivery of the execution to the sheriff was a taking in execution, are cases, where the property had been attached, and remained in the *actual* custody of the sheriff, or his servant. It is not necessary for us, nor are we at all disposed, to combat the doctrine, as applicable to such cases ; because here the property did *not* remain in the actual, or constructive, possession of the sheriff ; but went back into the hands of the general owner. The right, which the sheriff acquires to chattels by attachment here, and by delivery of the execution in England, is a special property in the nature of a lien, and the general property remains in the debtor, who may lawfully sell the goods, subject to the lien.—2 *Bac. Ab.* 721, 723 ; *Hotchkiss vs. McVicker*, 12 *Johns. Rep.* 403 ; *Bliss vs. Ball*, 9 *Johns. Rep.* 132 ; *Payne vs. Drew*, 4 *East*, 523 ; *Johnson vs. Edson*, 2 *Aikens' Rep.* 299. But this lien, in the case of attachment, must be accompanied with possession, either personal or through a servant ; and, whenever the possession is given up, the lien is gone. The special property, which the sheriff acquired by the attachment, is determined by the redelivery to the general owner ; and a sale or subsequent attachment is good ; attachments having always been holden to be governed by the principles laid down as to sales in *Edward vs. Harben*, 2 *T. R.* 587 ; and it is the general rule, with respect to pledges and liens of all sorts, that a voluntary delivery of the property to the general owner defeats the lien.—*Fletcher vs. Howard*, 2 *Aikens' Rep.* 115. There is, then, no pretence for saying, in the present case, that the property was constructively in the hands of the sheriff, and, of course, there is no room for the application of the principle of a constructive taking in execution.

2. But if it be admitted, that a bare delivery of the execution to the same deputy who attached the property, would be good to bind it, yet, it by no means follows, that a delivery to another deputy of the same sheriff would be so. The statute provides that the doings of the deputies shall be taken as the acts of the sheriff ; that is, that the sheriff shall be liable for the acts and neglects of his deputies, in the same manner as for his own ; and though he may generally adopt the acts of his deputies, and bring actions on receipts, taken to them, yet, whenever he does so, he is but the trustee of the deputy, (unless he has been damnified by his neg-

lect in the same case,) and therefore, can have no greater rights than the deputy would have, were the suit in his name. If the attachment was dissolved, and the receipt defeated, so that Allen could not maintain an action upon it in his own name, it cannot be set up again, by bringing the suit in the name of *Bliss*. Could Allen then maintain the action? He was not liable to the debtor, because the property had gone back into the debtor's hands; and he could not maintain an action, unless it was on the ground of his liability to the creditor through the sheriff: for it has always been holden, that the sheriff's right to recover upon receipts, or for a violation of his right to the property attached, is founded upon his liability over to either debtor or creditor. But is Allen liable to the creditor? The case does not show, that the property had been demanded of him; or that he had notice, that execution had been issued, and put into the hands of his brother deputy; and he could not be bound to take notice of the delivery to A. W. Butler, because Butler was not his agent or servant. Without such notice, he not only was not bound to keep the property more than thirty days, but it would have been his duty, at the expiration of that time, to have redelivered it to the debtor, if he had retained it in his own hands. A formal surrender of the property to the debtor was impracticable, in the present case, because he had already redelivered it to him, taking his receipt for it; and, at the expiration of thirty days, the law did what the officer would have done, had he kept the property in his own hands, by discharging the attachment. In *Scott vs. Crane*, 1 Conn. Rep. 255, it was holden, that, under circumstances like those of this case, there must be a demand of the attaching officer, in order to make him liable, and the universal practice in Vermont is, for the officer, who holds the execution, to notify the attaching officer, and take of him the receipt, without which he can have no authority to make a demand.

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II. There was no evidence, from which the destruction or total loss of the execution could legally be presumed. The supposition of the witness, that he had returned it to the clerk was sufficiently negatived by the testimony of the clerk; and the witness could not know, that the execution was not among his own papers, without a search for that purpose.—2 Stark. Ev. 350.

Mr. Porter, for the plaintiff.—A delivery of execution in thirty days to the same officer who attached, is charging in execution.—*Enos vs. Brown*, 1 Chip. Rep. 280. A deputy sheriff is a mere

CHITTENDEN servant of the sheriff, and his acts are the acts of the sheriff.—
December, *Smith vs. Joiner and Wood*, 1 *Chip. Rep.* 62. The statute is
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 Bliss full to the same purport. Therefore, a demand on the receiptor
 vs. in sixty days is sufficient. Where an attachment was made by a
 Stevens et al. deputy sheriff, and property was demanded by a constable, holding the execution, it was held sufficient.—*Davis vs. Miller*, 1 *Vt. Rep.* 9.

It is not necessary for the officer to show the execution or receipt, when he demands property, unless requested. Nor is it necessary for him to return the execution, as his return is not evidence of a demand.

HUTCHINSON, C. J., pronounced the opinion of the Court.—It appears by the exceptions, that the plaintiff was unable to produce on trial the original execution, which was delivered to his deputy, Butler, for him to levy upon, and sell, the property in question; and he offered testimony to show it lost—testimony, which the county court admitted, and adjudged sufficient to show the loss. We have no doubt, nor does there seem to be any question, but that the loss of an execution, wanted for the purposes of this suit, may be proved like the loss of any other paper. And we think the testimony adduced, in this case, if it gained credit with the court, was sufficient to prove the loss. It appears, that the deputy, who had the execution and made the demand of the property, on receiving a discharge from his interest, and being sworn, testified, that he thought he returned the execution to the clerk where the same was made returnable; that, though he had not looked over his papers with the particular view to find this execution, yet he had looked them over so often of late, that he was sure it was not in his possession. The clerk being sworn testified that he had made full search for it among his papers, and could not find it. The next question is, whether the demand of property was seasonably made, to bind the receiptors. This question is rather subdivided in argument, as will soon be noticed. Upon this part of the case, the testimony was, that the execution was delivered to Amos W. Butler, the plaintiff's deputy, four or five days before the expiration of thirty days from the rendition of the judgement, with directions for him to demand, and levy upon the property attached upon the original writ by Allen, another deputy of the plaintiff. Butler, after the expiration of said thirty days, but in the life time of the execution, demanded the property of each of the receiptors, the present defendants. It does not

expressly appear, whether he had the receipt, given to Allen ; but he seems to have discovered correctly who signed the receipt, and made the demand upon the right persons ; and they made no objection to deliver till the receipt could be produced, but said in general terms, that they were not ready to deliver the property. This must be considered as a waiver of any objection, which they might then have urged, if the receipt was not present. It might also be sufficient ground for the jury to presume, that the receipt was in the hands of Butler, ready to be delivered up on delivery of the property, and that it was so understood by them all at the time. But no such question seems to have been submitted to the jury, or raised on the trial. It will be recollected, that the production of the execution, in this cause, was of no other substantial use, than to rebut the presumption of payment, and to show, that it had not been kept back in the hands of the creditor or his attorney, to the destruction of the plaintiff's lien upon the property. This last seems fully proved by the oath of the person, who delivered the execution to Butler, having his memory refreshed by a receipt Butler gave for it, at the time of its delivery.

The remaining question is, whether the execution was so pursued and the demands so made, as to keep good the plaintiff's lien upon the property ? Did the attaching creditor, then, cause the property attached to be taken on his execution within thirty days from the rendition of his judgement ? It seems he delivered out his execution within said thirty days ; but he did not deliver it to the same deputy sheriff, who served his writ of attachment, but to another deputy of the same sheriff. Had he delivered it to Allen, who made the attachment, the property was not in his actual custody, to be levied upon in fact, momentarily. It was out in the hands of the receiptors. It seems not to be denied, that, had it been delivered to Allen, and had the property then remained in his actual possession, it might have been considered as levied, forthwith, upon the property. This is evidently correct ; for no ceremony of taking, or seizing, the property, already under his control, could be necessary. He might advertise it for sale as soon as he received the execution, and that without seeing it, or passing any other ceremony. But it is said, that this principle has only been extended to the cases where the property was in the actual custody of the officer, or his immediate servants, and not to cases, where the property had been receipted, and gone back to the possession of the original debtor, as in this case. Probably this distinction has not been much observed in practice, and

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it surely cannot stand upon any practical principle. When the sheriff attaches property, he keeps it in his own way. The creditor has no control over it. He has a right, at all times, to suppose the officer to be the actual keeper. And, upon that supposition, he gives his execution to the officer, for him to levy it forthwith, or consider it as levied, and proceed and sell according to law. This is all the creditor can do, unless he becomes an officer himself, which cannot be : and, when he has done this, which is all he can do, he has caused the property, in a legal sense, to be taken in execution. In other words, he has perfected his lien. And the attaching officer, thus receiving the execution, must, at his peril have the property where he can levy upon, and sell it. It is no excuse for him to say, he has delivered it out on a receipt, and it has gone back into the possession of the debtor. That is a matter for him and the receiptors to settle, as they can agree, or as the law will settle it between them. The officer's remedy is upon his receipt, like the present action. But it is urged, that the officer loses all remedy upon his receipt, unless he demands the property of the receiptors within thirty days from the judgement. If the officer's rights are so limited, it must be by construction merely ; for the statute contains no such limitation. When the creditor's lien is gone, the officer can have no remedy against the debtor himself, or those jointly holden with him. Also, *e converso*, when the creditor has so pursued as to preserve his lien, the officer should have a remedy upon his receiptors, unless he has forfeited it by some gross neglect, prejudicial to the receiptors. But the creditor's lien is as well preserved by delivering the execution to the same attaching officer, or by a demand on him, the last hour of the thirty days, as at any previous time. In many such cases, it may be impossible for the officer after he is rendered liable to the creditor, to make a demand of the receiptors within that hour, or even on the same day. It is, therefore, a necessary construction of such a receipt, in connection with the provisions of the statute, that the officer, being rendered permanently liable to the creditor, may demand the property of the receiptors at any time in the life of the execution, so as to levy upon, and sell it under the authority of the execution. This was decided in the case of *Strong vs. Hoyt*, reported in 2d *Tyler*, p. 208. There, Strong, as constable, attached personal property of one Starr. It was receipted to him by Hoyt. After judgement, and within thirty days, the creditor perfected his lien, by causing a demand to be made of Strong, who could not deliver the property to the officer, having the execution, because

it was gone to his receiptor. Strong had to pay the debt, and, about six months after the rendition of the judgement he demanded the property of Hoyt, and brought his action. Upon proving the creditor's lien on him to have been kept good, and also proving the property to have been actually converted before the judgement was rendered, he recovered of Hoyt, and collected his money. By some mistake, there is printed, at the end of that report, a motion in arrest, and the decision of the Court upon it; but the records of the case, and the recollection of all who yet live, and who were present during that trial, will show, that no such motion was ever made in that case. It must have been made for some other case, and wrongly placed where it is. So in the case of *Enos vs. Brown*, 1 *D. Chip. Rep.* 280. Burk, a deputy of Enos, served a writ and attached the property of Daniel Brown. Israel P. Brown receipted the property. The suit was prosecuted to judgement and execution. Within the thirty days, the execution was delivered to Burk. He made no demand of the receiptors till after the thirty days expired, but made it in the life of the execution. This was holden sufficient, and Enos, the sheriff, recovered. And this last case was decided on a writ of error, and probably upon good consideration. The result both of principle and authority supports the decision of the county court, in the case before us, if the execution had been delivered to Allen, the deputy, who made the attachment, instead of being delivered to the other deputy, Butler. The statute of this state, regulating the office and duty of sheriff, makes the sheriff liable to the creditor for all damages, arising from the act or neglect of any of his deputies; and expressly enacts, that the acts of the deputy shall be considered as the acts of the sheriff. Under this statute, the most proper mode of declaring is, to say nothing about a deputy sheriff, but allege that the writ or execution was delivered to the sheriff, and that he did the act, or was guilty of the neglect, complained of. So, in an action upon such a receipt, as is here in suit, the sheriff might allege, that he served the writ, and attached the property and took the receipt; and that the execution was delivered to him, and he made demand of the receiptors. And proving all done by and with his deputy, supports his allegations. In contemplation of law, upon the facts before us, *Moses Bliss* made the attachment, and took the receipt from these defendants, and the execution was delivered to *Moses Bliss* within thirty days from the rendition of the judgement. He, at a convenient time in the life of the execution, demanded the property

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CHITTENDEN, of the defendants, the receiptors ; and they neglected or refused
 December, to deliver it, so that he might levy the execution upon it. Upon
 1831. this state of facts, he has recovered a judgement against these
 Bliss defendants, in the county court.
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That judgement is found correct, and is affirmed.

CHITTENDEN MINER B. SHERWIN and PHILANDER VAUGHAN vs. MOSES BLISS.
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A declaration on a jail bond is bad, if it shows that the judgement, upon which execution issued, was not correctly described in the bond.

If defendants plead performance, and conclude with a verification, the plaintiff ought either to demur or reply over. Merely adding the *similiter* is not regular.

It is erroneous for the county court to decide on a matter of fact, without an issue properly joined, showing an agreement of parties to have the issue tried by the court.

This was a *writ of error*, brought to reverse a judgement rendered in a suit upon a prison bond. *Bliss*, the defendant in error, was sheriff of said county, and took the bond in question, and brought the suit in his own name, or suffered the creditor so to bring it, without any assignment of the bond. On inspection of the record, it appeared that said *Miner B. Sherwin* was committed to prison, upon an execution in favor of Orson H. Saxton and Horace Sherwin, and said *Vaughan* was his bail. The declaration described a regular judgement of the county court, rendered at the adjourned term, on the 22d of June, 1829 ; the taking out execution and commitment of defendant *Sherwin*, and the taking of the bond in question. All appeared regular till the bond appears fully described ; it then proceeded as follows : " which said bond describes and sets forth, that the term of said county court, at which said judgement was rendered, was holden on the first Monday in June, 1829 ; whereas it ought to have been set forth, as the fact is, that said term of said county court was holden on the 22d day of June, 1829." The defendants prayedoyer of the consideration of said bond, and it was spread upon the record ; and the same variance *there* appeared. The defendants then pleaded two pleas : 1st, *nul tiel record* ; 2d, a plea of performance, concluding with a verification. To both these pleas the plaintiff replied, by adding the *similiter* merely. The record further showed that, after one or two continuances, the court rendered judgement for the plaintiff, that there was such a record, and that the plaintiff ought not to be barred. To reverse which judge-

ment, the present writ of error was brought. *In nullo est erratum*, was pleaded. CHITTENDEN
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Marsh and Hill, for plaintiffs in error.—The first issue should have been found for the defendants below. It is a general rule, that courts and juries cannot find contrary to the record admission of the parties. The plaintiff below admits by his declaration, that no such judgement ever was rendered as described in his bond. The jury, (6 Comyn, 288,) may find by their verdict all things given in evidence material to the issue, if it be not contrary to the record or the admission of the parties. What judgement did the first plea put in issue? It was the judgement recited and set forth in the bond. It was necessary there should be a judgement to support the bond. But the plaintiff below says in his declaration, I have no such judgement, the bond is mistaken; and the record he offered in evidence supported not the judgement set forth in the bond, but the parol judgement set forth in his writ. This averment of the plaintiff, that his bond describes a wrong judgement, is material, and he cannot avoid the effect of it. But if by any rule of law it could be rejected as impertinent, or immaterial, under the pleadings in the present case, it is otherwise made to appear to the Court that the judgement described in the bond is wrong—that there is no such judgement to support the bond.

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It will be seen that the second plea prays oyer of the bond and the condition. Where an instrument is brought upon the record by oyer being craved by the defendant, it becomes, not a part of the plea, but of the plaintiff's declaration.--*United States vs. Sawyer*, 1 Gallison, 86; *Hughes vs. Mower*, 2 Pet. Con. Rep. 71, note. When by the oyer of the bond and the condition, the condition came upon the record, and made a part of the plaintiff's declaration, it then judicially appeared to the court, that the condition of the bond did not truly recite the judgement and the execution upon which *Sherwin* had been committed. The bond set forth one judgement, and the declaration a different one; and what judgement did the court find to have been rendered? the one in the bond or the one in the declaration?

But it is likewise a rule of law, when it appears to the court that the plaintiff has no cause of action, he cannot have judgement, though defendant's pleadings are insufficient. The instrument here declared upon is an official bond. The statute has prescribed the cases where, and the forms according to which, these instruments may be taken, and unless there is a compliance

CHITTENDEN with these requisites, the bond is of no validity. The condition of the bond must truly set forth the court, time, &c.; (*vide Statute*,) and a single bond, or one without a condition, or a different condition from what the law prescribes, would be of no validity. If in the present case the defendant had prayedoyer of the condition, and the condition had contained any thing not warranted by the statute, no matter what the defendant might plead, the court would not render judgement for the plaintiff. By the plaintiff's own declaration, as well as by the defendants' pleas, it appeared in this case the sheriff, when he took the bond, did not insert the condition the law pointed out. He did not insert the true time when the court was held. A title or right defectively stated may be cured by verdict; but a defective title never can be. It is bad on demurrer, motion in arrest, or writ of error. This is a case of *defective title*. When he alleges that his bond recites a wrong judgement, he shows his bond to be void and himself out of court.

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On the second plea the judgement should have been for the defendant, if any judgement should have been rendered. That plea, after oyer, states a general performance, concluding with a verification, and offers no issue. The facts set up are a sufficient answer to the declaration, and they are not traversed or denied by the replication, but, on the contrary, they are confessed and not avoided. We offer to verify our plea; the plaintiff says he will help us; but the court find against the joint admissions of both parties. No issue of any description is formed under this plea. The replication does not deny the plea or affirm the declaration.

The plaintiff could not have offered an issue without traversing the facts set up in the plea. It cannot be said, even in the case where the breaches are assigned in the declaration, and the defendant, after oyer, pleads performance, &c., concluding with a verification, the parties are at issue. There is no affirmation on one side and negative on the other. If the defendant pleads that A is living, and the plaintiff that A is dead, without a traverse that A is alive, the issue is bad after verdict.—(*Sav. 86.*) All the authorities concur in the position that issue cannot be joined on a plea of general performance; and wherever it is pleaded the plaintiff in his replication must reassign breaches, or support his declaration, and traverse the plea, concluding his replication with a verification; and this although the defendant cannot answer the breaches by his rejoinder, as that would be a departure.—1 *Saun.* 103; *Willes*, 12; *Cowp.* 575.

Leavenworth, for defendant in error.—1. The plea of *nul tiel record* is not a proper plea in an action of debt on jail bond, for this reason, the question whether there is a variance between the bond and the declaration, is not raised in this Court. We cite 1 *Chit. Pl.* 479, 481 ; 5 *Dane*, 422. CHITTENDER,
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2. The second plea is, that the bond was not broken : issue was joined upon this plea, and the fact proved in the Court below that it was broken, and no question is presented by this plea in this Court.

3. We also contend there is no variance between the record shown in evidence and the declaration.

The opinion of the Court was pronounced by

HUTCHINSON, C. J.—The defendant's first plea, of *nul tiel record*, refers to the record of the judgement described in the declaration as the foundation for the execution on which the debtor was committed to prison. That judgement appears correctly described, and was probably proved by the record produced. But there is no question properly before this Court, arising upon that plea. The defendant's plea of performance concludes with a verification. This would be right or wrong according to the nature of the plea. If it were nothing but a general plea of performance, or one alleged in terms not contradicting the specific allegations of the breach in the declaration, or brought new matter into controversy, it was correct. If it consisted in nothing but an averment of performance of all things specifically alleged, in the declaration, not to have been performed, it ought to have concluded to the country. Had this plea concluded to the country, adding the *similiter* alone would have been necessary. As this plea is, the plaintiff ought either to have demurred specially, because the plea concluded with a verification, or else to have replied over, praying an enquiry by the country. The merely adding the *similiter* by the plaintiff amounts to nothing. It closes no issue at all. And the plea of performance stands as if unanswered wholly. Moreover, the county court rendered judgement upon this second plea, without any issue of law or fact being joined to the court. And they could not decide an issue of fact unless by the agreement of parties. The regular joining an issue of fact to the court, would be sufficient evidence of such agreement of the parties : but here is nothing of that kind, and nothing which authorized the court to render judgement upon the plea in bar.

We are not disposed, however, to occupy much time in criti-

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cising upon these irregularities, which might be rectified, on terms, after a reversal of the judgement, while proceeding to render such a judgement as the county court ought to have rendered ; and pass to consider the declaration, which we consider incapable of support. It would have been bad, even if the judgement had been rendered by default. The prison bond, though taken to the sheriff, is taken for the benefit of the creditor ; and can be binding upon the signers, only, when the imprisonment is legal. Not that the plaintiff, in a suit upon such a bond, must prove a lawful imprisonment, in the first instance. The bond, reciting that which shows a lawful imprisonment, is sufficient *prima facie* evidence to entitle the plaintiff to recover. But yet the defendants are not bound by this. They may show the imprisonment illegal, either from the beginning, by showing that there was no judgement to warrant the execution, or that the imprisonment, at first legal, has become otherwise, by reversal of the judgement, or by a payment and discharge. In the present case, the declaration shows, that the bond is founded upon an execution, issued upon a judgement of the same court, for the same sums as the judgement first described in the declaration, but rendered at a court holden on the first Monday of June, 1829 : when the first described judgement was rendered at the term holden on the 22d day of June, in the same year. That is, the judgement was rendered the 22d day of June ; the execution issued upon a judgement rendered the first Monday of June. This variance is as fatal, as a variance in the sums, or parties, or any other particular whatever.

The judgement of this Court is, that the county court erred in the rendition of judgement in said original action ; that the declaration of the original plaintiff, now defendant in error, is wholly insufficient. In the allowance of costs we follow the printed rule of this Court, with regard to the taxation of costs upon writs of error. The plaintiffs in error must recover their cost in the prosecution of this writ of error, but no cost in the original suit, because the point on which we now decide was not raised and insisted upon by the plaintiffs in error, in their defence to the original suit.

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A partial payment of a debt due is no consideration for a promise to wait for the residue another year.

If there were a good consideration for such a promise and the promise were binding, in order to bar an action of ejectment on a mortgage, it ought to be pleaded as a lease for a year.

Such promise, made on good consideration, might be the ground of an action to recover damages for the breach of it; but for nothing more.

This was an action of *ejectment* for 49 acres of land in Colchester, in the county of Chittenden. The defendant interposed the following plea in bar, to wit :

“ And now the defendant in court, by his attornies, defends the wrong and injury when, &c., and says, that the plaintiffs from having and maintaining their said action thereof against him, at the time said action was commenced, ought to be precluded, because he says, that the plaintiffs' claim to the premises, described in their said declaration, is founded upon a mortgage deed, executed by the defendant to the plaintiffs, to secure the payment of a certain promissory note, given by the defendant to the plaintiffs, dated June 2d, 1828, and payable one day after date ; which is described in the conditions of said mortgage for the sum of \$120,88. And afterwards to wit, on the first day of October, 1829, it was agreed between the plaintiffs and defendant, that, if the defendant should then pay to the plaintiffs upon said note, the sum of twenty-five dollars, they, the plaintiffs, would postpone the time for the payment of the remainder of said note one year from said first day of October, 1829. And the defendant avers, that he did then and there pay to the plaintiffs said sum of twenty-five dollars, and the plaintiffs did thereupon, and in consideration of said payment, promise not to call on the defendant for the balance of said note, but would postpone the time of payment of the remainder, for said term of one year, and would not prosecute the defendant for the possession of said mortgaged premises previous to that time ; and this he is ready to verify : wherefore the defendant prays judgement if the plaintiffs ought, prior to the first day of October, A. D. 1830, to have or maintain their aforesaid action against him the defendant.”

To this plea there was a *general demurrer* and *joinder* in demurrer.

A. G. Whittemore, for the plaintiffs.—We have two objections to this plea :

1. Because no sufficient consideration is stated for the promise to postpone the collection of the debt, even if the action were upon the note. This note being originally payable in money, and due long before the payment was made, and before the promise

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is said to have been made, the payment could not constitute a good consideration for the promise to wait for the remainder. With respect to the consideration, there is no difference between a contract to extend the time of payment, or alter the manner of payment, and an agreement to discharge the remainder of a debt upon payment of a part only. Both are equally contracts varying the original agreement in important points, and alike prejudicial to the creditor ; and, upon principle, something new should intervene, by which the plaintiff gains some advantage, or the defendant suffers some loss or injury, as a reason or motive for postponing the payment of a just debt due in money long before.—*Chit. on contracts*, 286–7 ; *Heathcote vs. Crookshanks*, 2 T. R. 24 ; *Fitch vs. Sutton*, 5 East, 230–1 ; *Pinnel's case*, 5 Co. 117, (abridg. 182 ;) *Adams vs. Tapling*, 4 Mod. 88 ; *Co. Lit.* 212. The reason of these cases applies to the case under consideration, where the defendant seeks to enforce a contract to extend the time of payment of a debt, payable immediately in cash, founded upon a consideration every part of which is prejudicial to the plaintiffs.

It is evident this payment cannot be called injurious to the defendant, or extra beneficial to the plaintiffs. It ought to have been made shortly after the date of the note ; but the plaintiffs, glad to get any thing, received cattle and endorsed the full value of them on the note, instead of cash. I am at a loss to divine what extraordinary meritorious considerations can enter into the part payment of a just cash debt, when that payment is made in cattle, instead of cash, as the parties originally contracted. If there is any thing between these parties, which entitles this attempt to defeat the plaintiff's of their remedy to special favor, it is not disclosed in this plea.—*Bates vs. Starr*, 2 Vt. Rep. 536.

2. As this action is founded upon a technical deed of lands, this plea is no bar to a recovery of the possession. Where a statute or peremptory rule of law has made an instrument the exclusive criterion of truth, a contemporaneous, or subsequent, parol agreement cannot be admitted to enlarge, alter, extend, or contradict the terms of such instrument.—3 *Stark. Ev.* 997. The same principle applies, where private parties have, by mutual compact, constituted a written document the witness of their admissions and intentions.—*Ib.* 998. If the contract is by deed, which imports a sealed instrument, no evidence, whether oral or written, which is not under seal, can be admitted to contradict or vary it.—*Ib.* 1002 ; also, note s. and t. ; *Leslie vs. De La Torre*, cited in

12 *East*, 583. Where a ship was chartered by *deed* to wait for convoy at Portsmouth, it was holden, that evidence could not be admitted of a subsequent parol agreement to substitute *Corrunna* for Portsmouth. See the same principle illustrated in *Mildmaye's case*, 1 *Co.* 176, (*abridg.* 12 ;) *Bedel's case*, 7 *Co.* 39, (*abridg.* 225 ;) *Colman vs. Packard*, 16 *Mass.* 39, where parol evidence to prove a contract, that the mortgagor should remain in possession, was excluded.

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We are willing to rest the cause here ; but might add, if necessary, that this plea amounts merely to the general issue.

Horsie and Allen, for the defendant.—1. The defendant contends, this matter in bar ought to be pleaded and not given in evidence ; because it is in the nature of a plea in abatement ; and, in all pleas in abatement, the matter in abatement ought to be specially stated. It is in the discretion of the court to allow a special plea, amounting to the general issue, if it involve such matter as might be proper for the decision of a jury.—*Stephens on pleading*, p. 463 ; 4 *Bac. ab.* 60, (*Pleas, G. 3 ;*) 3 *Mod. Rep.* 166 ; *Carr vs. Hinckliff*, 4 *Barn. & Cres.* 547 ; (10 *C. L. R.* 408 ;) also, 5 *Com. Dig.* 76. Though a man plead a thing which may be given in evidence, yet in some cases this shall not amount to the general issue.—4 *Bac. ab.* 64, (*Pleas, G. 3 ;*) *Skin.* 362, *per Ld. Holt* ; (2 *Saund. on plead.* 272.) Where a special plea amounts to the general issue, it is a defect in form merely, and can be taken advantage of upon special demurrer only.—*Archbold's pleadings*, p. 196 ; 5 *Com. Dig.* 76 ; *Ib.* 77.

2. Defendant contends, that the agreement to extend the time of payment is, in a moral and legal point of view, binding. “ A promise in forbearance of a suit is good.”—1 *Com. Dig.* 133 ; *Chitty on contracts*, 9. A subsequent parol agreement, not contradicting the terms of the original contract, but merely in continuance thereof, and in dispensation of the performance of its terms, is good.—*Chit. on con.* 27 ; (1 *Maule & Selwin*, 21.) “ There may be cases of a secondary contract, executed on the part of the debtor binding.—*Bates vs. Starr*, 2 *Vt. Rep.* 539. Where the debt was ascertained, and a fund provided for its payment, it is a good plea.—*Heathcote vs. Crookshanks*, 2 *T. Rep.* 27.

The opinion of the Court was pronounced by

HUTCHINSON, C. J.—This is an action of *ejectment*, to which the defendant has pleaded in bar, that the plaintiff's title is by vir-

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tue of a certain mortgage deed, given to secure the payment of a certain note therein described : and that, after this note had become payable, the plaintiff received a part payment, and agreed, in consideration thereof, to wait another year for the remainder ; and that this year had not expired, when the action was commenced. To this plea the plaintiff has demurred.

We consider the promise, set up in this plea, to be not obligatory upon the plaintiff. The law requires, that the consideration of a promise should be something, which is a benefit to the promisor, or an injury to the promisee. In this case, the defendant, after his debt was matured, and ought all to have been paid by him, paid a part of it, twenty five dollars, which he now claims as a consideration for the promise to wait another year for the residue. This, in a legal sense, is neither a benefit to the plaintiffs nor an injury to the defendant ; who ought to have done all this, and more too, without any promise from the plaintiff. Again, if there were a good and valuable consideration for the promise, it would be no bar to the present action, as here pleaded. It might be the foundation for an action of assumpsit to recover the actual damage for the breach of the contract, and nothing more. A covenant never to sue creates a bar ; but a covenant not to sue for a given time is no bar ; it is only a ground for the recovery of damages. This principle is applied in the books to all actions, real and personal. It applies with stronger force to our action of ejectment. Our statutes require, that the title to lands should appear of record. They also render a recovery in an action of ejectment, conclusive with regard to title, between the parties to the suit, and those claiming under the parties. Under such circumstances, it would be going too far, to admit a parol agreement, postponing the payment of the mortgage money, to postpone also the right of action for the mortgaged premises.

If any thing could be made of the facts here presented, it must be done by treating them as amounting to a lease of the premises for a year. If the facts are pleaded at all, they should be pleaded according to their operation in law. This plea is rather declaring upon the evidence. The plaintiff could not maintain ejectment for the premises, during a period in which they had leased the premises, even by parol lease ; for such lease would give a right to the possession ; and the plaintiff could not treat such possession as a trespass. And, further, a parol lease for a year is not required, by statute, to be in writing. Whether the facts, on which the defendant relies, would support the allegation

of a lease for a year, we do not, we need not, decide ; but unless they amount to that, they make no defence at all.

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The plea in bar is insufficient, and judgment is rendered, that the plaintiff recover.

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JOHN H. BURTON vs. JAMES AUSTIN and CHARLES R. BLAKE.

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The plaintiff in ejectment cannot recover damages for rents and profits, unless he recovers the land sued for ; then the damages follow by force of the statute.

The plaintiff, in such case, must have title, as against the defendant, both when his action is commenced, and when it is tried.

Ejectment by mortgagee, commenced after a decree of foreclosure, is defeated by mortgagor's paying the amount of decree, which destroys the title of the mortgagee.

This was *ejectment* for the undivided half of lot no. 167, in Highgate. Plea, *not guilty*. On the trial in the county court, the plaintiff read in evidence a mortgage deed from the defendant, *James Austin*, to himself, conveying the undivided half of said lot, dated Nov. 26, 1828, and given to secure the payment of a note of that date for \$100. The plaintiff, also, read in evidence the copy of a deed, duly certified, from the defendant, *Austin*, to the defendant, *Blake*, of the same undivided half of said lot, dated June, 1829, and describing said premises as subject to said mortgage to the plaintiff. And, it being admitted, that the defendants were in possession at the commencement of the suit, the plaintiff rested his case. The defendants gave in evidence the record of a foreclosure in favor of the plaintiff against the defendants, upon the mortgage aforesaid, showing a decree obtained by the plaintiff at the January term, 1830, the time of redemption to expire in January, 1831. The defendants then proved, that, within the time limited by said decree, to wit, on the 12th day of December, 1830, but after the commencement of this action, they paid the amount decreed, with the interest thereon, in full satisfaction of the decree. The defendants contended, that, on proof of these facts, the action was defeated, and they were entitled to a verdict. But the court decided, that the ejectment was not defeated by said payment, but the plaintiff was entitled to proceed for his costs in the ejectment, until the same were paid, and, accordingly directed a verdict for the plaintiff to recover nominal damages and his cost. To which decision the defendants excepted, and the case was thereupon reserved for the opinion of this Court.

After argument by *Stevens*, for the defendants, and *Smalley and Adams*, for the plaintiff,

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HUTCHINSON, C. J., *pronounced the opinion of the Court.*—The plaintiff, as mortgagee, has recovered nominal damages and his cost, but has not recovered the land sued for. The county court, it seems, considered that the defendant's paying the amount of the decree of foreclosure, still left them liable to pay what cost had arisen in the action of ejectment at the time of such payment, though such action was commenced after the decree was made.

In revising this decision, we are led to examine the title of the mortgagee to the mortgaged premises. His title enables him to hold till his debt is paid. At common law, he is entitled to sue forthwith, and obtain possession; but then he must account for the rents and profits, in case of redemption afterwards. By our statute, the mortgagor has right to hold possession till failure of payment of some instalment. If the mortgagee recover possession and damages for rents and profits, these rents and profits so recovered, if collected, as well as the rents and profits taken from the premises by the mortgagee, go so far in payment of the debt, whenever the mortgagor chooses to pay the residue. If the mortgagee gives no deed, but conveys the debt, this conveyance of the debt carries, in equity, the land also, as a security for the payment of the debt. But if ejectment is brought, it must be in the name of mortgagee, or of one who holds under him by deed. And, if the plaintiff in ejectment does not own the debt, he recovers and holds in trust for him who does own the debt. And no such transfer can take away the right of the mortgagor to have the rents and profits, by whomsoever taken, applied in payment of the mortgage money, until an actual foreclosure.

Our statute has regulated the action of ejectment, also, and given a form of action not known at common law: and by section 88, on page 84-5, provides, that the plaintiff shall recover as well his damages, as the seizin and possession of the premises; and, by that and another statute, the judgement, while in force, makes a good title to the premises, in the party recovering, whether he be plaintiff or defendant. This has been construed, and must be construed, to mean a judgement rendered upon the trial of the merits. If a judgement upon the merits is decisive of title, care must be taken that no recovery shall be had by plaintiff when he has no title. The county court, bearing this in mind, did not suffer the plaintiff to recover the premises sued for, because his title was gone, by payment in full of the mortgage money. But considering that the plaintiff had title, when he commenced his action, the defendant was liable to pay the costs, which had accrued, while that title in the plaintiff continued.

They, therefore, directed a verdict for the plaintiff, with nominal damages only. Here a question arises, whether the plaintiff in ejectment can recover damages in any case, unless he recovers the land. This question was agitated in Chittenden county, three or four years since, in a case of so great equity on the part of the plaintiff, that the Court entertained a strong inclination to support it, if possible. That case seems not yet reported. I believe it was the case of *Catlin vs. Blake*. The plaintiff had a good title as against the defendant, when he commenced his action; but, pending the suit, a decree in chancery between him and one Tuttle had compelled each to quit to the other various lots of land; among which this lot, then in the possession of Blake, was to be conveyed by Catlin to Tuttle. He made a conveyance accordingly. Blake set up this conveyance in his defence, showing the title out of the plaintiff. It was evident, the plaintiff could not recover the land, for his title was gone. But he was equitably entitled to the rents and profits, as damages, during all the time in which his title continued, and the defendant had those profits. The decision upon this point was carried to the Supreme Court, where it was decided that the recovery of damages was an appendage of the recovery of the land, in the action of ejectment; and that, as the plaintiff could not then recover the land, his title being gone, he was entitled to recover no damages in that action. This terminated the cause in favor of the defendant against Catlin. We must consider this decision as an authority, that the plaintiff cannot recover damages, in an action of ejectment, unless he recovers the land sued for, and then the damages for rents and profits follow as an appendage of the land itself.

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The plaintiff must have a good title, as against the defendant, both when he commences his action of ejectment, and when the same is tried. This is laid down in *Adams on ejectment*, page 32; and supported by several authorities there cited.

The same author, on page 33, suggests, however, that the right of possession expiring, pending the suit, would not prevent a recovery. To support this he cites the 14th of *East's Rep.* 488, *Doe, ex dem. Grundy vs. Clark*. But there is no such law in that case, nor do I find any such in any book whatever. The only point, decided in that case, was, that the overseers of the poor could not maintain ejectment against a defendant, who took possession under former overseers, and who had never acknowledged himself to be holding under the plaintiffs.

We may now enquire how these principles affect the present

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action. The plaintiff admits, that he ought not to recover, if this suit had been commenced after the defendants had paid up the mortgage money, contained in the decree of foreclosure. But he contends, that he had a good cause of action when it was commenced; and that the defendants cannot volunteer to pay the amount of the decree and defeat this action, without paying the cost of this suit, likewise. We think this does not present a case of voluntary payment, in the sense supposed in argument. The plaintiff in his own time brought his bill of foreclosure, and obtained a decree, without opposition from the defendants. While that decree was running, the plaintiff brought the present suit. When the decree was about to expire, and the defendants must either pay, or forever lose the land, they paid the full sum in compliance with the terms of the decree. This payment was no more to be deemed voluntary on the part of the defendant, than if he had paid the same sum on an execution, to prevent being imprisoned. The plaintiff brought this action probably supposing there would be no redemption, and wishing in that event, to obtain possession as soon as possible, after the title became absolute in him. But it was at the risk of a judgement against him in case of redemption. The plaintiff's title being a mere security for his debt, and he being entitled to recover no damages, prior to actual foreclosure, but what would be money in his hands as part payment of that debt, as soon as that debt was paid, his title was wholly gone; and he had no remaining equitable right to damages, any more than he had legal right; for the defendants were obliged to pay interest for the money till the debt was actually paid.

If there had been no decree of foreclosure, and the defendant had offered payment, the plaintiff would not have been obliged to receive any thing, till the whole was offered, including all costs legally made. But, if he consents to receive the principal debt, and discharges it, without insisting upon costs in collateral suits, it is difficult to discover his right afterwards to compel payment of those costs.

The decision, we now make, is in accordance with the decision in the case of *Edgell vs. Stanfords*, reported in the 3d Vol. of *Vermont Reports*, page 202. The question in that case was rather one of practice; whether the plaintiff, in ejectment on mortgage, must produce his note on trial, to avoid the presumption of payment, or whether the defendant must prove payment in order to avail himself of it. The Court decided, that the plaintiff must produce his note, or fail to recover. They considered the debt

the principal matter in controversy ; and, as the evidence of that debt was in possession of the plaintiff, it would be no hardship for him to produce it. The plaintiff's counsel seem to have indulged a hope that they should persuade this Court not to treat that case as authority : but they have not persuaded us to overrule it. It must be required of the plaintiff to produce the note, either on trial, or on fixing the sum due in equity. And he may as well produce it on trial as afterwards. The truth is, the giving of the mortgage deed acknowledges the giving of the note therein described ; but it does not acknowledge its existence at any later period. The mortgagee is the keeper of the note. If any payments are made upon it, it is usual to indorse those payments, and preserve no other evidence of them. It would be wrong, in such a case, to permit the plaintiff to pocket his note, and recover judgement, unless the defendant could prove these payments by other testimony. Moreover, there might be no such note, by reason of a misdescription in the mortgage, as was Edgell's case. And it would be very unjust to let the plaintiff recover the land upon the strength of a note, which had no existence, and then sue the actual note and recover its amount. This would be turning about the established rule of evidence, that the party possessing papers, must produce them, if he would derive any benefit from them.

We consider the doctrine of that case, not permitting a mortgagee to recover in ejectment, unless he yet has a debt secured by his mortgage, to be correct. And both from the authority of that case, and from general principles, as, also, from the reason of the case, we consider the judgement of the county court erroneous, and the same is reversed, and a new trial is granted.

The plaintiff, after this decision, not wishing for another trial, consented to a judgement for the defendants, and the Court allowed the defendants to tax cost only from and after the time when he satisfied the decrees of foreclosure.

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Any matter of defence, which goes only to a part of the plaintiff's claim, should be pleaded to so much only, as it tends to meet.

It is no defence to *scire facias* on a judgement, that the plaintiff has received the amount from the officer, who had failed to collect of the debtor, when the debtor has never paid the debt, and the creditor permits his name to be used for the benefit of the officer.

This was a writ of *scire facias*, calling upon the defendant to show cause, if any he had, why the plaintiff should not have execution upon a judgement, which the plaintiff, several years before, had recovered against the defendant, and which the plaintiff, in his writ of *scire facias*, affirmed to be in full force, whereof execution remained to be done.

The defence, set up by the defendant in the county court, was, That thirty-five dollars, a part of said judgement, had been paid by the defendant, and that the remainder had been paid by one Barlow, a deputy sheriff, as agent for the defendant. This last part of the defence was exhibited in various forms of pleading; to which the plaintiff replied, &c., and several issues were joined to the jury; and they returned a verdict for the plaintiff upon all of them. These verdicts silenced all the controversy except upon two points. One of these was raised by the defendant's motion for a judgement in his favor, notwithstanding the verdict against him. The other question arose upon a bill of exceptions, allowed by the court, stating the facts, that the plaintiff's first execution was delivered to Joel Barlow, deputy sheriff, to collect; that he collected thirty-five dollars of the defendant, and paid it over to the plaintiff's attorney; that he failed to collect the remainder, and thereby became liable to pay the balance, and advanced the same to the plaintiff's attorney, out of his own money, and retained the execution in his own hands; that, before this action was commenced, said attorney paid over the full amount of these monies, so received by him, to the plaintiff, and took his receipt for the same; and that this action was brought and prosecuted by Barlow, in the name of the plaintiff and for the benefit of Barlow, to recover the balance, which had not been paid by this defendant. The defendant's counsel insisted, that, upon these facts, the debt ought to be considered as paid, and the judgement extinguished, and that this action could not be maintained. But the court instructed the jury, that the money advanced by Barlow, in discharge of his liability, ought not to be considered, under the circumstances of the case, a satisfaction or extinguishment of the

judgement; and that if they found the facts as the plaintiff contended for, they would return a verdict for the plaintiff, so that he might have execution for the balance. The jury accordingly found a verdict for the plaintiff. The defendant brought up the case with a view to reverse the judgement of the county court, on one or both of the grounds above named.

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Argument for the defendant.—The defendant insists that this payment by Barlow, with his own money, as found by the jury, was a *full and complete* satisfaction of the judgement, so that *no action* can be sustained thereon.

1. Because the payment by Barlow was not qualified or conditional, nor a mere advance of money to the creditor. He received the money from the officer without *any stipulation or condition*, but as an absolute and perfect discharge of the debt. The debt must therefore be considered satisfied as to the judgement creditor.—15 *Johns.* 443, *Sherman vs. Boyce*; *Peake's N. Pri. cases*, 144, *Eyles vs. Faikney*, note.

2. If this fact be established, the law deems the officer "*junctus officio*." The direct and sole object of calling in the aid of the law, was to compel payment to the creditor. This object being accomplished, and the creditor satisfied, the power conferred by it is spent, and the officer is not permitted to use it for his own benefit.—*Langdon vs. Wallis*, 1 *Lutw.* 589. The law requires of sheriffs a strict execution and observance of their precepts; and if an officer holding an execution sleeps, upon it, and tortiously neglecting his duty, fails to execute it, and satisfies the judgement out of his own money, he is entirely without remedy against the debtor.—*Reed vs. Staats et al.* 7 *Johns.* 425; *Weller vs. Weedale*, *Noy*, 107. He will not be suffered by a *voluntary* neglect, and a consequent after payment, which is in effect a voluntary payment, to make a third person his debtor, *without* the concurrence of either of the other parties; for it is a well settled maxim of law that "no man shall take advantage of his own wrong."

3. If there is a debt *any* where existing, after the satisfaction of the judgement creditor by the officer, it *must* be in *favor* of the *officer*; and it would be a strange anomaly in a court of justice, if an officer of a court could wield the process of that court, to redress his *own* grievance, compel payment of *his own* debts, and exact such a *measure* of justice as *he* should think due to *himself*. It would constitute him the minister of *justice* or *vengeance* in his *own* cause; and would not only open the way

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for infinite abuse, oppression and cruelty, but would, says *Platt*, Justice, in *Sherman vs. Boyce*, “tend to subvert the foundation of private rights and civil liberty. Then, after the creditor is satisfied, and his rights extinguished, and the debt, if not discharged, has become the officer’s, if he cannot use the original process to enforce payment of it to him, can he be permitted to procure an execution that will avail him, by an action on the judgement, and thus accumulate another bill of cost? Most clearly he cannot. It would produce a multiplicity of suits—oppress the debtor by increasing the debt—without in the least remedying the evil of the principle.

4. The plaintiff in this case, having had a full and perfect satisfaction of his debt, cannot maintain the action for his *own benefit*, for “no man shall have two satisfactions for the same thing.” And though, as it respects the debtor, *he may* have paid nothing, yet the plaintiff cannot on that account sustain an action against him any better than he could against each trespasser in cases of joint trespass, after having received satisfaction from one of them.—*Bird vs. Randall*, 5 *Burr.* 1345; *Cooke vs. Turner*, *Hob.* 66; *Sanderson vs. Caldwell*, 2 *Aikens*, 195; 2 *Saund.* 148, in note. Barlow, the officer, cannot maintain an action in his own name against the debtor, without first a demand upon him for the money, and a request from him to pay it; of which there was neither in this case. Without these, “it is very clear,” say the court in *Allen vs. Holden*, 9 *Mass.* 136—“that the action cannot be maintained by the officer; for he would be obliged to found his claim on his own failure of duty.—*Menderlock vs. Hopkins*, 8 *Johns.* 340; *Jones vs. Wilson*, 3 *Johns.* 430; *Beach vs. Van Denburgh*, 10 *Johns.* 369; *Walkeld vs. Mamakating*, 14 *Johns.* 87.

5. It is made the duty of all sheriffs, “to execute and return “every precept agreeably to the directions therein given,” and the law will not lend its aid to relieve an officer who has been guilty of any breach of duty, not even where the other party has acted grossly dishonest.—*Stat.* 203; 17 *Com. Law Rep.* p. 17, *Collins vs. Snuggs*; 4 *East*, 568, *Sedgeworth vs. Spicer*; 7 *Term Rep.* 109, *Fuller vs. Prest*; 1 *Term Rep.* 418, *Rogers vs. Reeves*.

This case is analogous to that of arrest and a voluntary escape. If in that case the creditor chooses to pursue his lien upon the officer, and thereby obtains satisfaction from him, the officer has no remedy against the debtor, neither by arrest on the original pro-

cess, nor by a suit : the creditor having once received *satisfaction* is also barred. And even an agreement, by a third person, that, if the officer will delay the commitment of the debtor for a certain time, he shall be forthcoming at the end of the time, in the life of the execution, is void ; for it *tends* to a *breach* of *duty*.—10 *Mass.* 59, *Appleby vs. Clark* ; 2 *Bac.* 24 ; 4 *Mass.* 370, *Ayer vs. Hutchins* ; 2 *Vt. Rep.* 344, *Stevens vs. Webb*.

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Argument, for the plaintiff.—The plaintiff in this case contends that the directions given to the jury by the court were right. It appears from the case that the money advanced by Joel Barlow, (the person for whose benefit the suit was brought,) was not in payment and discharge of the judgement and execution against *Holmes* ; but it was advanced by Barlow to obtain a discharge of his liability to the plaintiff. The fact that Barlow paid to the plaintiff the *whole amount due from Holmes* to procure a discharge of his liability, no more operates as a *payment* and *discharge* of the judgement against *Holmes*, than it would had a less sum than the whole balance of the execution been paid by Barlow. Now it will not be contended, that, had Barlow paid the plaintiff the trifling sum of five dollars to procure a discharge of his liability, this would operate to discharge the judgement against *Holmes*. But if the sum paid by Barlow to the plaintiff's attorney, in discharge of his liability, is to be so far regarded as a payment of the execution against *Holmes*, that the plaintiff could enforce the collection of the balance due against *Holmes* for his own benefit, still, it is contended, that an action can be maintained against *Holmes* on this judgement, in the name of the plaintiff, for the benefit of Barlow, who is equitably entitled to the balance due on said judgement against *Holmes*. The Court are bound to protect the equitable interest which Barlow has in this judgement, and aid him to recover the sum honestly due from the defendant.—*Allen vs. Holden*, 9 *Mass. Rep.* 133 ; *Brown vs. The Maine Bank*, 11 *Mass. Rep.* 153 ; 15 *Mass. Rep.* 481 ; 1 *Term Rep.* 619 ; 1 *Swift's Dig.* 434 ; *Chip. Rep.* 41 ; *Ld. Ray.* 1411.

HUTCHINSON, C. J., pronounced the opinion of the Court.—We find a singular state of pleadings in this case. The plea, which begins in some measure like a plea in bar, proceeds more like the answer to a bill in chancery. It is a plea to the whole ; yet is so pleaded, that it could never be met by any one replication, that could end in a single issue. The matter of this defence

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should have been presented in a form wholly different. For instance, as to thirty-five dollars, a part of said judgement, the plaintiff ought not to have his execution, because he, the defendant, paid that sum to the plaintiff, &c., and as to the remainder of said judgement, proceed in like manner to show payment. And, if the defendant wished to present this last in several shapes, as would seem probable by his present plea, he might plead by leave of Court, as many as the facts relied upon would require, to save the rights of the defendant. There must be distinct pleas, and capable of being traversed, or met by a single replication—and all conclude with a verification, just as the pleas to any other action.

To the pleas filed in this case the plaintiff has replied, and, to his replications the defendant has rejoined. And issues were joined to the jury, at the termination of each branch of the pleadings. The verdict of the jury for the plaintiff, upon all these issues; has disposed of every thing, except the two questions named in the case, which indeed are but the same question, raised in different forms.

The defendant's motion for a judgement, notwithstanding a verdict against him, is grounded upon the supposition that one of the issues was immaterial. On examining this issue, we find its materiality depends wholly upon the view the Court may entertain upon the correctness of the instructions given to the jury: for that issue is nothing more nor less, than, whether the payment, of which the defendant claims the benefit, was made by Barlow with his own money, and not as agent for the defendant; and this, when there is no pretence that the defendant has ever paid it, otherwise than through this payment by Barlow, or advancing by Barlow, as the case states it. If the creditor's having received the amount of his debt, after the officer is rendered liable for it by his neglect on the execution, necessarily operates as payment and satisfaction by the debtor, then the issue was immaterial. It was immaterial whether the payment was made by the sheriff, or by the defendant, with the sheriff's money, or with the defendant's money, by the sheriff, in discharge of his own liability, or as agent for the defendant. All these must alike be immaterial, if they alike enure for the benefit of the defendant, in payment and satisfaction of the debt. If so, the instructions were also incorrect; for they attach great importance to the same facts put in issue to the jury, and which the defendant now contends are immaterial.

The defendant's counsel rely upon the cases they cite from the 7th and 15th of *Johnson's Reports*, to show, that a sheriff, committing a neglect in the collection of an execution, can have no after benefit from the judgement or execution, to reimburse himself. It appears to me I have sometime read the report of a decision in that state more in point for the defendant than these. Possibly I may have understood these to go further than appears on a careful perusal of them. These really go no farther than the common principle, considered to be law here, and every where, *That, if any, who stand in the place of the debtor, by signing with and for him, or becoming his bail, pay the debt, it is paid, and can be no more used as against the debtor or any others of his sureties.* They must severally resort to their principal for remuneration, or to their cosureties for a contribution. In these cases cited, if I understand them correctly, the money was actually raised by the debtor himself, with the aid of the sheriff as indorser or surety. That, when paid to the creditor, as fully extinguished the debt, as if some third person, instead of the sheriff, had been indorser or surety.

The plaintiff's counsel cite cases from the 9th and 15th of *Mass. Reports*, to show that the courts in that state sustain actions in the name of the creditor for the benefit of the sheriff, who had become liable on the execution, and had paid its amount to the creditor, and taken his assignment of the debt. Cases have been frequent in this state, where sheriffs and their deputies, have paid over money, when liable by reason of their neglect in collection, and taken a receipt from the creditor or his attorney, and suffered no indorsement upon the execution, and afterwards have collected, by the aid of suits in the name of the creditor; and I recollect no question ever raised upon such a procedure in this state, until in the defence of this action. We are unable to discover any difficulty, or injustice that could ever proceed from sustaining a suit for the benefit of the officer, who has become liable, and has advanced the money to the creditor, on taking his assignment of the debt. If execution is obtained in such suit, it must go into the hands of some officer, who is not interested, for collection. This will avoid a good share of the difficulties the Court were so cautious to avoid in those cases cited from *Johnson's Reports*; and we discover no more difficulty in the present case, than if Barlow had taken an assignment when he advanced the money. How does this case stand? The money now sued for has never been paid by the defendant; but Barlow, the officer, advanced the

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amount to the plaintiff, and the plaintiff tells us of record, that he is prosecuting this suit for the benefit of Barlow. The officer neglecting, must never be permitted to speculate, becoming himself liable, and make payment ; and then act as creditor and officer both. Probably, in most cases, where the officer becomes liable to the creditor, without actual collection of the money, it is owing to the humanity of the officer, and want of good faith and punctuality in the debtor. In such cases it would be hard to suffer the debtor to treat this indulgence of the officer as a crime, and debar him of all remedy. Still, the officer can never use the name of the creditor, to collect by suit, unless he first makes his peace with the creditor. But, when he uses the name of the creditor, without any objection from him, to collect a debt from him who ought to pay it, there is no hardship in presuming that the creditor has made an assignment to the officer, who has an equitable claim to such assignment.

The defendant, in this case, has interposed no plea on which any question could arise, about the want of the authority to use the plaintiff's name in recovering this balance. And, where it is averred, in the replication, that Barlow advanced his own money to the plaintiff, and that this suit is brought and prosecuted for the benefit of Barlow, to remunerate for his expenditure, we treat these as the assertions of the plaintiff, and these assertions of record. And they ought to be treated as an assignment, so far as relates to this suit. There is, therefore, no error in the judgment of the county court, either in their instructions to the jury, or in their overruling the defendant's motion for judgment, notwithstanding the verdict against him. Their

Judgement is affirmed.

Smalley & Adams, for defendant.

Hunt & Beardsley and Smith, for plaintiff.

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RUTH CARR vs. JOHN CORNELL.

In an action on *book account*, though each party is made a witness by statute, that provision does not extend to the wife of either ; nor can she be admitted to testify.

This was an action on *book account*, in which the wife of the defendant was offered a witness for her husband, and excluded by the auditor. The county court affirmed this decision. On exceptions to that decision, the cause was brought up to this

Court, and here argued. The facts will be fully understood from the arguments, and the opinion of the Court.

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Hunt and Beardsley, for the defendant.—The question presented in this case, for the decision of the Court, is, whether the auditor improperly rejected the defendant's wife, offered by him as a witness. The report states, that the defendant offered his wife to prove, that she made the contract with the plaintiff, settled with her, and paid her for her services; and that the knowledge of these facts was exclusively with the witness offered. It also states, that the plaintiff's charges were for labour performed in the defendant's family. Under such a state of facts, whatever may be the law, as it respects the competency of the wife, under other circumstances, we insist, she was a competent witness, and ought to have been admitted in the present case. We are aware, that, as a general rule, the wife cannot be a witness for, or against, her husband: but to this rule, even at common law, there are sundry exceptions, which grow out of the necessity of particular cases. But if, under any circumstances, the wife can be a witness, at common law, upon the ground of necessity, or any other ground, the same principle of necessity ought, unquestionably, to apply in this case, and determine the right.

It is apparent, from the facts in this case, that the defendant's wife acted as the agent of her husband, and, indeed, transacted the whole of the business; and that her husband was not privy to any portion of it; and it is upon this ground, that her declarations have been held to be admissible. We are unable to discover why she may not herself be a witness.

But, again, the statute has expressly constituted the parties, in book actions, competent witnesses, which is in direct violation of the common law rule upon this subject. The book action is exclusively a *creature* of the statute; and, in some of its main features, directly opposed to common law principles; and, if the declarations of the wife may be given in evidence at common law, when the husband himself cannot be a witness, in analogy to that *doctrine*, we think, that we may well insist upon her competency, under the statute, in cases where the husband, being a party, may be a witness. In short, under the statute, we insist, that wherever the husband may testify in his own cause, his wife may be a witness for him; and this principle seems to be recognized in the state of Connecticut.—1 *Swift's Evidence*, 98.

Mr. Stevens, for the plaintiff.—For the plaintiff it is contended, that, by the common law, a wife can in no case be admitted to

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testify for or against her husband.—4 *Term Rep.* 678, *Davis vs. Dunwoody* ; 6 *Term Rep.* 680 ; 2 *Starkie*, 706 ; *Peake's Ev.* 180.

It is also contended, that the act passed February 23d, 1797, relating to actions of account, being in derogation of common law, should be construed strictly ; and that, from the words of the act, it was not the intention of the legislature to enable the wife of a party to be made a witness.—*Statute*, 141.

HUTCHINSON, C. J., *pronounced the opinion of the Court.*—It appears by the report of the auditor in this case, that the parties exhibited their mutual accounts before him ; and that of the plaintiff exceeded that of the defendant, by a small sum ; and he reported a balance in favor of the plaintiff, after disallowing some items of the defendant's account. The county court rendered judgement for the plaintiff on the report, and the defendant excepted to the decision, and brought the action up to this Court. One question only is now presented ; that is, whether the auditor did right in excluding the wife of the defendant, when offered by him as a witness to support the defendant's account. We consider that the auditor was correct in excluding this witness, and the county court correctly confirmed his decision. The general principle of law is, that no person interested in a cause can be admitted to testify in favor of that interest. Neither can a feme covert testify in favor of her husband ; because they are necessarily one in interest. Nor can she be permitted to testify against her husband, were she willing, because it would necessarily destroy that social harmony, which ought ever to exist between husband and wife. But it is contended, that the statute having made the defendant a witness to support his own account, that includes the admission of the wife also ; especially in a case like this, where the wife had a more particular knowledge of the transactions than her husband. It is true the legislature might have enacted a law broad enough to have admitted the wife, as well as the husband. But they have not done so ; and we cannot extend the provisions of the statute : nor should we be disposed to do it, if we had the power. As soon as the wife is introduced as a witness for the defendant, her husband, she must be liable to the cross-examination of the opposite party ; and this is attended with all the inconveniences that can be urged in any other case. It has the same tendency to interrupt the harmony of the matrimonial connexion. It was said in argument, that the wife had been admitted in a like case in Connecticut. I have examined *Swift's*

Digest, and have failed to find any mention of it. There may have been such a decision there ; for they once had a statute which admitted interested witnesses, other than the parties, in actions of book debt, as the action is there termed. But I should hardly think it good policy to admit the wife, even under such a statute. Be that as it may, we have no such statute here.

The judgement of the county court is affirmed.

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SOCIETY FOR PROPAGATING THE GOSPEL IN FOREIGN PARTS vs.  
ARDEN H. BALLARD and WILLIAM BALLARD.

FRANKLIN,  
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1832.

One cannot be legally made a defendant in a suit at law, unless he be served with process in some way provided by statute ; and

Where a landlord in ejectment resided out of the state, and a writ, sued out against him, having been returned *non est inventus*, the court directed notice of the pendency of the suit to be given by publication in a newspaper, and he subsequently appeared and answered to the action,—it was decided that he be dismissed therefrom with cost.

This was an action of *ejectment*. The writ was duly served on *William Ballard*, and a regular *non est inventus* was made as to the person and property of *Arden H. Ballard*. The action was entered on the docket of the county court, as against both defendants. And after one or two continuances, the court, at the request of the plaintiffs, made an order that notice to *Arden H. Ballard*, of the pendency of the action against him, be published in the newspapers, the same as though the writ had been duly served upon him. This order of notice was published in the newspapers, as required by the court ; and after its publication, *Arden H. Ballard* appeared in the action, and filed the following plea, or motion :

“ *Franklin county court, September term, 1830.* And now  
“ the said *Arden H. Ballard*, in court by his attornies, comes  
“ and moves this honorable court, that said cause may be dismissed as to the said *Arden H. Ballard*, because he says, that said writ  
“ has never in any manner been served upon the said *Arden H.*,  
“ as will appear by said officer’s return on said writ. Wherefore,  
“ the said *Arden H.* prays that said suit, as to him, be dismissed,  
“ and for his costs.”

*Replication the same term* : “ And now the plaintiffs, in reply  
“ to the plea of the defendant, say, that the said cause ought not  
“ to be dismissed as to the said *Arden H. Ballard*, because they  
“ say, that he, the said *Arden*, at the time of the service of said  
“ writ, was not an inhabitant of this state, nor had he resided in

FRANKLIN, " it, for a number of years, nor has since resided in this state.  
 January " Nor had the said *Arden* any family here, or personal property  
 1832. " within the knowledge of the plaintiffs, which might have been  
 Society, &c. " attached on said writ. But the said *Arden*, at the time of the  
 vs. " commencement of this action, resided in the territory of Michigan,  
 Ballard et al. " and no service could have been made on him, except in the  
 " manner which has been adopted in this case, by publishing in a  
 " newspaper by order of court. And the plaintiffs further say,  
 " that the said *Arden*, is the landlord, and is required by statute  
 " to be made a defendant in this suit.

This replication was demurred to ; and there was a joinder in demurrer. And afterwards, at the December adjourned term, 1830, the county court rendered judgement, that the replication is insufficient in law, and that the said *Arden H. Ballard* be dismissed with his costs, taxed and allowed at \$9,38. To which decision the plaintiffs excepted, and the case was thereupon reserved for the opinion of this Court.

*Aldis and Davis, for the plaintiffs.*—The case shows that *Arden H. Ballard* is the landlord, and *William Ballard* the tenant, holding under him ; and the statute (p. 84) makes it necessary that the suit should be brought against both ; and if it had been otherwise brought, the suit must have abated. *Arden H. Ballard* resides in the territory of Michigan, and had no property here ; of course, no personal service could have been made on him. The statute (p. 64–65) provides, that writs of summons or attachment shall be served by delivering the defendant a copy thereof, or by leaving such copy at the house of his usual abode ; and if the defendant do not reside within this state, and real estate be attached, then the copy is to be delivered to his tenant, agent or attorney, if any be known ; and if no agent, tenant or attorney, be known, then a copy must be left with the town clerk ; and if personal property be attached, then at the place where the property is attached.

It will be seen that the statute requires a copy to be left only where the defendant is an inhabitant of the state, or where real or personal property is attached. In this case the defendant, *Arden H. Ballard*, was not an inhabitant of this state, and no property was attached. The requirements of the statute respecting the leaving a copy cannot, therefore, apply to him ; for it would be idle to pretend that the officer must go out of the state to serve the writ. If a copy had been left at some place where the said *Arden* had formerly resided in this state, or with some agent or attorney,

if any were known, it would have been nugatory, because not required by the statute.

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A case like the present is not provided for by any particular statute ; it must, therefore, be subject to the general laws of the land, taken in connection with that part of the statute which requires the landlord to be joined with the tenant. The legislature would never have directed the landlord to be joined, if it had not supposed he could, in all cases, be legally brought into court. We must, therefore, presume that the landlord can be legally made a defendant in court, though he reside out of the state, and no process be served on him. Now it is contended, that the only legal mode of making *Arden H. Ballard* a defendant, was that which was adopted in this case, by making a *non est* return, entering the cause in court, and publishing as in cases where the defendant is out of the state at the time the suit is brought, and has not had notice. If such proceedings are not sufficient to make him legally a party on the record, then there is no way in which he can be sued. If there be any question respecting the legality of these proceedings, his appearance in court, and answering to the cause, is presumed to remove all doubts on the subject.

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*Smalley and Adams, for the defendant.*—The plaintiffs say that *A. H. Ballard* was the landlord of *Wm. Ballard*, and ought to have been joined in the suit. Admitting that *A. H. Ballard* is not an inhabitant of this state, and has no personal property here ; that he is landlord, and ought to be joined in this suit,—it is difficult to comprehend how the plaintiffs can legitimately draw from these premises the conclusion that they could sue *A. H. Ballard*, or take an illegal course to make him party to the record. It is now universally the received opinion that a judgement is not binding *in persona* when the person is not within the jurisdiction of the court rendering judgement. Will the court aid the plaintiffs in an attempt to acquire a fruitless jurisdiction, or subject the defendant to the hazard hereafter of an irregular proceeding? The judgement of the court, if it have any jurisdiction, must be *in rem* ; and the plaintiffs rest the regularity of their proceedings on the necessity of joining the defendant, *A. H. Ballard*, and the fact that there is no *res* upon which to found jurisdiction.

*BAYLIES, J., delivered the opinion of the Court.*—The statute requires, that ejectment should “ in all cases be as well against the “ landlord or landlords, if any there be, as against the tenant, or

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“ tenants in possession of the premises demanded ; and if any  
“ such action be otherwise brought, the same shall, on motion, be  
“ abated.”—(*Revised Statutes, chap. 7, s. 88.*) When the writ  
issues against the landlord and tenant, and is delivered to a proper  
officer to serve and return, and the officer serves the writ on the  
tenant, and makes a *non est inventus* as to the person and property  
of the landlord, and the writ is returned to court, and entered upon  
the docket as against the tenant only, it cannot be supposed that  
the action would abate for not joining the landlord. The land-  
lord is joined in the writ, and the plaintiff did what he could to  
have the writ served on him, but failed. This most assuredly is  
no cause of abatement within the purview of the above statute.  
But we have no law to make a landlord, who is joined with his  
tenant in the writ, a defendant in the action, if the writ be not  
served on him in some one of the ways prescribed by statute. In  
the case before us, the writ was not served on *Arden H. Ballard*  
in any way whatever ; therefore, without his consent, he cannot  
be a defendant in the action. The plaintiffs causing his name to  
be entered on the docket as defendant, gave the court no jurisdic-  
tion over him. And the plaintiffs’ subsequently procuring an order  
of notice to be published in the newspapers, of the dependency of  
the action against him, was equally unavailing ; for it is only in a  
case, where the writ *has been served* on the defendant in his ab-  
sence, that the court is authorized to make such order ; and not in  
a case, where there has been *no service* at all.—(*Revised Statutes,*  
*chap. 7, s. 55.*) But it is contended by the plaintiffs that *Ar-*  
*den H. Ballard’s* appearance in court, and answering to the ac-  
tion, cured all prior defects. It is observable, that *A. H. Ballard*  
made his appearance, not to plead to the merits of the action,  
but merely to be dismissed, because there had been no service of  
the writ on him. In the case of *Wilson vs. Laws*, (1 *Salk.* 59,)  
the court say, “ appearance helps only, when the party comes in  
and pleads to issue ; not when the party comes in and challenges  
the process upon account of its defects ;” and refer to 1 *Ro.* 789 ;  
*Bul.* 142 ; 2 *Cro.* 284 ; *Yelv.* 204 In the case of *Westall vs.*  
*Finch*, (*Barnes*, 406,) “ the defendant moved to stay the pro-  
ceedings, the process not having been served upon him, but upon  
another person, and obtained a rule to show cause. Upon showing  
cause, it was insisted by the plaintiff, that although the process  
might be served upon a wrong person, yet an *appearance* being  
now entered, the defendant was in court, and the mistake was aid-  
ed. But *per. cur.* ; the appearance is entered by plaintiff according

to the statute: this act by no means corrects the mistake. Let the rule be absolute."

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Perhaps, it might be difficult to reconcile all the authorities on this subject; but we are inclined to believe, that the appearance of *A. H. Ballard*, made for the purpose it was, did not cure the defects complained of, and the county court did right in dismissing him. But whether he should have costs allowed him is a question of some importance, as it respects practice.

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I know of no case, where a person who had not been served with process, and by *accident* or *mistake* his name was entered on the docket, as one of the defendants in the action, has *appeared* to ask the court to *be dismissed with costs*. If his name is there by *accident* or *mistake*, it should be erased from the docket, without costs to be paid him by the plaintiff. But in the case before us, the name of *A. H. Ballard* was entered upon the docket by the procurement of the plaintiffs, with a view of making him one of the defendants in the action. Then this entry was not made by *accident* or *mistake*, and *A. H. Ballard* having been notified by the newspapers, that the plaintiffs had this action pending against him, had a right to appear, resist their irregular proceedings, and recover his costs.

The judgement of the county court  
is affirmed, with additional costs.



#### AUSTIN FULLER vs. JACOB FULLER.

FRANKLIN,  
January,  
1832.

Where, in an action on the statute to prevent fraudulent and deceitful conveyances, the declaration alleged that one *E. S. on, &c.*, owned and possessed certain lands and tenements, and goods and chattels, to wit, [describing the land,] together with the carding machines, picking machines and clothier's tools, in and upon the premises, subject to a mortgage incumbrance, alleging that the whole property was of a certain value,—it was held, that the declaration, though defective for not expressly averring, that there were carding machines, &c., in and upon the premises, and the value thereof separate from the land, and the amount of the incumbrance, was nevertheless good after verdict.

In such case it is not necessary to aver that the personal property, alleged to have been fraudulently conveyed, had been *delivered* to the defendant; as the conveyance would be fraudulent, within the meaning of the statute, without a delivery.

The declaration in such case need not conclude *contra formam statuti*.

Where an act is an offence at common law, and there is a statute prohibiting the same offence, and annexing a penalty or forfeiture, it is not necessary, in declaring for the penalty, to allege that the acts constituting the offence, were done *against the form of the statute*.

This was an action *on the case*, brought on the statute to pre-

FRANKLIN, vent fraudulent and deceitful conveyances, (chap. 32, s. 7,). The  
 January, 1832. declaration was as follows :

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“ The defendant is attached to answer unto *Austin Fuller*, who  
 sues as well for himself, as also for the county treasurer of said  
 county of Franklin, in a plea of *trespass on the case*, for that  
 whereas, by the 7th section of a certain act, or statute law of this  
 state, entitled “ an act for the punishment of certain inferior  
 crimes and misdemeanours,” passed by the legislature on the 15th  
 day of November, A. D. 1821, at the annual session thereof hol-  
 den at Montpelier, it stands enacted, ‘ That all fraudulent and  
 “ deceitful conveyances of goods or chattels, and all bonds, bills,  
 “ notes, contracts and agreements, and all suits, judgements and  
 “ executions, made or had, to avoid any right, debt or duty, of  
 “ others, shall, as against the party or parties only whose right,  
 “ debt or duty, is endeavoured to be avoided, their heirs, execu-  
 “ tors, administrators or assigns, be utterly null and void ; any  
 “ false pretence, or feigned consideration, to the contrary notwith-  
 “ standing. And every of the parties to such fraudulent and de-  
 “ ceitful conveyances of goods or chattels, bond, bill, note, con-  
 “ tract, agreement, suit, judgement, or execution ; or any convey-  
 “ ance of lands, houses, tenements or hereditaments, made with  
 “ like fraudulent intent, who being privy thereto, shall justify the  
 “ same to be made, had or executed, *bona fide*, and upon good  
 “ consideration ; or shall alien or assign any houses, lands, tene-  
 “ ments or hereditaments, so to him, her or them, conveyed, as  
 “ aforesaid, shall forfeit the full value of such houses, lands, tene-  
 “ ments or hereditaments, and the full value of such goods or  
 “ chattels ; also so much money as shall be contained in such  
 “ covinous bond, bill, note, contract or agreement ; which forfeit-  
 “ ures shall be equally divided between the party aggrieved, and  
 “ the county treasurer, for the use of the county, to be recovered  
 “ by an action on the case, brought on this statute.’ And where-  
 as, heretofore, to wit, on the 23d day of May, A. D. 1827, at  
 Montgomery, in said county, to wit, at Enosburgh, aforesaid, one  
 Ezra Sherman, junior, of Montgomery, in said county of Frank-  
 lin, was, and ever since hath been, and still is, justly indebted to  
 the said *Austin Fuller* in a large sum of money, to wit, the sum  
 of four hundred and twenty three dollars and eighty seven cents,  
 and the interest thereon since the 11th day of January A. D. 1827,  
 specified in two certain promissory notes, duly executed by the  
 said Ezra Sherman, jun. to the said *Austin Fuller*, and bearing  
 date on the said 11th day of January, A. D. 1827, one for the sum of  
 \$232, payable in neat cattle, over four years old, and under eight  
 years old, (bulls, stags and cows excepted,) to be delivered at the  
 house of the said *Austin*, (meaning the dwelling house of the said  
*Austin* in Enosburgh aforesaid,) in the month of October next,  
 after the date of said note, with interest ; and the other for the  
 sum of \$191,87, payable in good rye and corn in the month of  
 January next after the date of said note, delivered at the said *Aus-*



tin's mills, (meaning at the mills of said *Austin* in Enosburgh aforesaid,) with interest:—*And whereas on the said 23d day of May, A. D. 1827, the said Ezra Sherman, jun. owned and possessed the following described lands, and tenements, and goods and chattels, lying and being in Montgomery aforesaid, to wit, one piece, &c., [particularly describing the premises,] together with the carding machines and picking machines, with all the clothier's tools in and upon said premises, subject to a mortgage or incumbrance upon part or all of said premises, to one Martin D. Follett, jr. And the said Austin Fuller in fact says, that the estate and interest of the said Ezra in and to the premises aforesaid, and the goods and chattels aforesaid, on the 23d day of May, 1827, was of great value to wit, nine hundred dollars, to wit, at Montgomery aforesaid. And the said Ezra afterwards, on the same 23d day of May, A. D. 1827, to wit, at Montgomery aforesaid, fraudulently and deceitfully, and with intent to defraud the said Austin of his said demands against the said Ezra, and altogether to defeat and avoid the same, by his certain deed of conveyance, executed in due form of law, bearing date the same day and year last aforesaid, for a pretended and feigned consideration of 700 dollars, conveyed the real estate, and the goods and chattels before mentioned, to the said Jacob Fuller. And the said Austin, further says, that the said Jacob, then and there, accepted and received said conveyance from the said Ezra, and was then and there privy to the same, and had full notice of said fraudulent and deceitful intent and purpose of the said Ezra therein. And the said Austin further says, that the said Jacob, so being privy to said fraudulent and deceitful conveyance, as aforesaid, and with notice of such fraudulent intent of the said Ezra, as aforesaid, afterwards, to wit, on the day and year, aforesaid, to wit, at Montgomery, aforesaid, and at sundry other times thereafter, did justify said conveyance to be made, had, and executed, bona fide, and upon good consideration. And the said Austin further says, that the said Jacob, afterwards, to wit, on the 20th day of October, A. D. 1827, to wit, at Montgomery aforesaid, so being privy to said fraudulent and deceitful conveyance, as aforesaid, by his certain instrument and deed of conveyance, executed in due form of law, in consideration of a large sum, to wit, \$900, did alien and convey said premises to one Cyrus Larkin. By means of all which the said Austin hath been greatly aggrieved, hindered and delayed, and wholly defrauded of his said debt against the said Ezra, to wit, at Enosburgh aforesaid. To the damage of the said Austin, as he says, one thousand dollars.—Wherefore, to recover the forfeiture incurred by the said Jacob, by force of the statute aforesaid, to wit, the value of the estate and interest of said Ezra in and to the said lands and tenements aforesaid, and the goods and chattels aforesaid, at the time of the fraudulent and deceitful conveyance by him to the said Jacob, as aforesaid, which the said Austin avers was the sum of \$900, and just costs, the said Austin brings this action on the case upon the statute aforesaid, as well for himself as also for the county treasurer aforesaid."*

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Fuller.

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To this declaration the defendant pleaded the general issue, *not guilty*, which was tried by jury before the county court, at their April term, 1830, when the jury returned their verdict for the plaintiff to recover of the defendant the sum of \$240 damages, and his costs. Whereupon the defendant filed his motion in arrest of judgement, and assigned the following causes : 1st. That there was no sufficient averment in the declaration, that there were carding machines, picking machines, and clothier's tools, on the premises conveyed ; nor of their number, quality, or value. 2d. That there was no sufficient averment of the amount of the mortgage on the premises at the time they were conveyed. 3d. That it did not appear there was any delivery of the personal property, without which there could not have been any valid transfer to affect creditors. 4th. That the declaration ought to have concluded, *against the form of the statute in such case made and provided* ; or to have some where alleged that the offence was committed *against the form of the statute*.

The county court overruled the motion in arrest, and rendered judgement on the verdict for the plaintiff to recover the damages aforesaid, and his costs, taxed and allowed at \$220,65. To all which the defendant excepted ; and the case was reserved for the opinion of this Court.

*Aldis and Davis, for the defendant.*—In declaring for offences against a penal statute, where no form is given, the plaintiff must set forth specially and unequivocally the facts on which he relies to constitute the offence.—*Bigelow vs. Johnson*, 13 Johns. Rep. 428. In the case under consideration, it is not alleged what was the amount of the mortgage on the premises, nor what was the value of the personal property conveyed. Both of these facts ought to have been particularly stated, that it might be ascertained with certainty what the value of each species of estate was.

It does not appear there was any delivery of the personal property, nor any change of possession whatever. For aught that appears, Sherman remained in possession of it, after the conveyance, and exercised acts of ownership over it, in the same manner as before. If so, how could the plaintiff have been defrauded ? He need not have paid any attention to the conveyance ; but might have attached it afterwards as well as before the conveyance to defendant. As to the personal property, then, the plaintiff has no cause of action. It is not a case of title defectively stated ; but a case of defective title, and is not cured by verdict.

Where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial; and therefore, there is no room to presume that all the circumstances necessary to entitle him to recover were proved. In the present case it was not requisite for the plaintiff to have proved such a delivery and change of possession of the personal property as would constitute a transfer which would affect creditors, because such a transfer is not alleged in the declaration. But if it could be presumed that those circumstances were proved which would make the conveyance valid as to creditors, we say, no proof at the trial can make good a declaration which does not contain a good ground of action on the face of it.—*Rushton vs. Aspinall*, 2 Doug. 683.

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In actions brought on penal statutes, the declaration must conclude *against the form of the statute in such case made and provided*, or some where allege that the offence was committed *against the form of the statute*; and the omission of these words is fatal. The present declaration, it will be seen, is defective in this particular.—1 Chit. Pl. 357-8; *Lee vs. Clark*, 2 East Rep. 333.

*Hunt and Beardsley, for plaintiff*.—1. The plaintiff insists that the defects complained of in the declaration, though fatal on special demurrer, are cured by the verdict. A verdict aids a title defectively set forth. Wherever there is a defect or omission, which would have been fatal on demurrer, yet if the issue joined be such as necessarily required proof of the facts defectively stated or omitted, such defects, or omissions are cured by the verdict.—11 Johns. Rep. 141; 2 Johns. Rep. 550; 5 Mass. Rep. 306; 4 Con. Rep. 196; 1 Day, 186, note; 9 Mass. Rep. 198; 12 Mass. Rep. 505; 3 Pick. Rep. 225; 4 Johns. Rep. 237; 15 Johns. Rep. 250; 1 Aik. Rep. 287; Cowp. Rep. 827; 2 Com. Law Rep. 155; 2 Salk. Rep. 459; 5 Com. Law Rep. 422.

2. The principal objection which the defendant has raised to the declaration, is, that it does not conclude with the technical allegation *contra formam statuti*. In considering this objection it becomes important to ascertain the object and purpose of such an averment, and to examine into the nature of that class of cases in which it has been considered indispensable. The object of the averment, *against the form of the statute*, as we understand it, is merely to show that the action is brought on the statute, and that this may be shown by any other allegations, which in substance have the same import. In all cases, where an action is founded on a statute, only, it is, to be sure, indispensable to show, that the

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acts complained of constitute an offence against the statute. But in what part of the declaration, or in what words, or manner, this is made to appear, is immaterial : if it is in any manner set out in the declaration, the conclusion, *contra formam statuti*, is not necessary. The case of *Barkhamstead vs. Parsons*, (3 *Con. Rep.* 1,) is direct and conclusive upon this point. The forms—“*American precedents*,” 339—are taken from cases which have passed the ordeal of judicial scrutiny, and have been decided to be correct. In neither of those cases, has the averment of *contra formam statuti* been made, or held necessary. See also 1 *Swift's Dig.* 735 ; 4 *Mass. Rep.* 487 ; 5 *do.* 306 ; *Salk. Rep.* 504, *Coundell vs. John*. In the present declaration, the statute is recited : facts necessary to show an offence against the statute, are set forth. The declaration then states, *by force of the statute*, the forfeiture had been incurred ; and then directly avers, that the plaintiff *brings this action on the case upon* the statute aforesaid. This shows, conclusively, that the defendant has committed acts in direct violation of the statute, and that the plaintiff has brought his action upon that statute, to recover the forfeiture therein prescribed.

The case of *Lee vs. Clark*, 2d *East*, 333, an authority on which the defendant mainly relies to support his position, will be found to fall far short of supporting the objection to the present declaration. Indeed, in no one feature does it compare with the present case, except in the doctrines advanced by the Court, which go to fortify the position we have assumed. That case was an action brought by a *common informer*, which makes it a very different case from the one under consideration, being an action brought by the party injured, to recover a debt, of which the defendant had undertaken to deprive him ; and greater strictness is required in *indictments* and *informations* than in private actions. Another marked distinction between the case of *Lee vs. Clark*, and the present case, is, that the statute, upon which the action in that case was brought, not only prescribed the penalty, but created the offence ; and of this description are all the other cases, which would seem at first to support the defendant's ground. Whereas, in the present case, the offence complained of, and for which the plaintiff seeks to recover the penalty prescribed by the statute, was an offence also at common law, and punishable by a common law proceeding ; and the remedy presented by the statute is merely *cumulative*. Admitting the case of *Lee vs. Clark*, therefore, to be law, it cannot in this instance avail the defendant.

**BAYLIES. J., delivered the opinion of the Court.**—I shall first consider whether there be sufficient averments in the declaration, that there were carding machines, picking machines, and clothier's tools in and upon the premises conveyed, and of their number and value, and of the amount of the mortgage upon the premises conveyed.

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The declaration says, "Whereas, on the said 23d. day of May, A. D. 1827, the said Ezra Sherman, jun. owned and possessed the following described lands and tenements, and goods and chattels, lying and being in Montgomery aforesaid, to wit," [here the lands are described,] "together with the carding machines and "picking machines, with the clothier's tools, in and upon said "premises, subject to a mortgage incumbrance upon part "or all of said premises to one Martin D. Follet, jr. And the "said *Austin Fuller*, in fact, says, that the said estate and interest "of the said Ezra, in and to the premises aforesaid, and the goods "and chattels aforesaid, on the 23d. May, 1827, was of great value, "to wit, nine hundred dollars."

It is not expressly averred in the declaration that there were carding machines, picking machines, and clothier's tools in and upon the premises ; nor is their number and value, unconnected with the land, any where alleged ; nor is the amount of the mortgage upon the premises stated. These certainly are defects in the declaration ; but we consider they are cured by the verdict. —9 *Mass. Rep.* 495 ; 10 *Mass. Rep.* 316 ; 11 *Johns. Rep.* 141 ; 15 *Johns. Rep.* 121.

As to the third cause of arrest,—it is not necessary that personal property should be delivered by the vendor to the vendee at the time of sale, or afterwards, to make it fraudulent within the statute. If not delivered, it is a mark, that the sale was fraudulent. *Twine's* case was decided on the statute of 13 *Eliz. c. 5* ; and the court say, "the donor continued in possession, and used the goods as his own ; and by means thereof traded with others, and defrauded and deceived them." This was considered a sign, or mark of fraud in the sale of the goods.—(*Rob. on conveyances*, 545.)

As to the fourth cause of arrest, that the declaration does not conclude *against the form of the statute*,—If an offence, which was not an offence at common law, be created by statute, and an action be given to collect a penalty, or forfeiture, for such offence, the plaintiff in an action for the penalty or forfeiture, must, in his declaration, either at the close, or in some other part, allege the facts constituting the offence, to be *against the form of the statute*.

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The case of *Lee vs. Clark*, in error from C. B. 2 *East*, 333, was an action of debt for a penalty on the game laws. The declaration stated, "that Daniel Lee, (plaintiff in error,) within the space of six calender months, next before the commencement of this suit, to wit, on the 21st of January, 1801, at, &c., unlawfully used a certain engine, called a snare, to kill and destroy the game of this kingdom; he the said Daniel, not being then and there qualified by the laws of this realm, nor having any lawful authority so to do; whereby, and *by force of the statute in that case made and provided*, an action hath accrued to John Clark, (defendant in error,) to demand and have of and from the said Daniel, five pounds.—*Plea, nil debet.*" That action was brought to recover a penalty annexed to an offence created by statutes, and not existing at common law. *Lord Ellenborough, C. J.*, says, "I cannot so well dispose of the first error, that the offence for which the penalty is given is not alleged to be *against the form of the statute*; it being clear that this was no offence at common law, and only made so by statute." "In an action for a statute penalty," (annexed to an offence created by statute,) "by a common informer, as well as in proceedings by indictment or information, it has been invariably holden that the fact must be alleged to be done *against the form of the statute.*" In this case the declaration had not these words, and the court adjudged it insufficient. But for an offence at common law, where there is a statute prohibiting the same offence, and annexing a penalty or forfeiture, recoverable by an action of the case, or an action of debt, to be brought on the statute, it is not necessary for the plaintiff to allege in his declaration, that the facts constituting the offence were done *against the form of the statute.* But if the plaintiff seek to recover such penalty or forfeiture, he must allege, that he demands it *by force of the statute*, and bring the facts constituting the offence clearly within the statute. And if the plaintiff allege the facts to be *against the form of the statute*, it will not injure the declaration; but it is not necessary to insert these words, where the offence exists at common law. *Lord Mansfield* says, "that the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law was calculated to attain every end and purpose of the statute of 13 *Eliz. c. 5*, and 27 *Eliz. c. 4.* (*Cowper*, 434.) I apprehend it is because fraud is an offence at common law, that the declarations on the statute of 13 *Eliz. c. 5*, do not contain the allegation, that the facts, constituting the offence, are *against the*



*the form of the statute.* These words are omitted in all the declarations, which I have seen on this statute.—(7 *Wentworth's plead.* 223, Declaration in debt, *qui tam*, on a fraudulent bill of sale of goods.—*Id.* 338–9, Declaration, two counts, *qui tam*, by a party grieved against defendant for a fraudulent judgement, suffered by one, and recovered by the other, to defraud the plaintiff.)

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The facts constituting an offence within the statute of 13 *Eliz.* c. 5, would constitute an offence within our *statute*, ch. 32, s. 7. And a declaration on this statute need not contain the allegation, that the facts are *against the form of the statute*, any more than a declaration on the 13 *Eliz.* c. 5. Hence, I conclude, that the omission of these words in the declaration before us is no error, and

The judgement of the county court must  
be affirmed, with additional costs.



DERRICK HOGABOOM vs. DANIEL HERRICK.

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Where the surety in a note requested the creditor to sue the principal, and informed him he did not wish to stand as surety any longer, and the creditor delayed to sue till the principal had become insolvent,—held that the surety was not thereby discharged.

A naked agreement between a creditor and one who is holden to him as surety, that the surety should be discharged, and no longer holden for the debt, is without consideration and void :

But if such an agreement so quiet the surety that he thereby neglects taking measures to secure himself till the principal has become insolvent, *quære*, whether he is not discharged from further liability.

Where referees, in an action on note against a surety, decided that the widow of the principal debtor could not be a witness to show that her husband had paid the note, and did not state in their report on what grounds they made their decision,—it was held that it should be presumed they had decided right.

This was an action of *assumpsit* on a promissory note, signed by the defendant and one Stockwell, which by the agreement of the parties was submitted to referees, and the same was made a rule of court. The referees reported generally, that the plaintiff having maintained his action against the defendant, ought to recover the sum of *thirty four dollars, and twenty-five cents*, and *his costs*. They also made a special report disclosing the following facts : 1. It was agreed by the parties that the defendant signed the note for twenty-five dollars, on which this action was brought, as surety for *Ebenezer Stockwell*, the other signer of the note. 2. The



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defendant proved, that after the note fell due, some time in the summer of 1825, the defendant requested *Hogaboom*, the plaintiff, to collect the note of Stockwell, and informed the plaintiff that he did not wish to stand as surety for Stockwell any longer, and that Stockwell had returned from Quebec. 3. That afterwards, in the fall following, the parties met at Highgate furnace, when the plaintiff agreed that he would discharge the defendant from all liability on the note, and would not hold the defendant any longer as surety. The parties started to go to Dr. Cutler's to have him write the discharge, but hearing that Cutler was from home, they called evidence of the agreement. 4. That Stockwell had property sufficient to pay the note at any time up to about the first of September, 1828; on the 7th day of which month he died. 5. "That Stockwell's estate was insolvent, and would not pay more than eight or ten cents on the dollar. The commission on said estate expired on or about the 16th of March, 1829. The note was allowed against said estate by the commissioners on the same." 6. "The defendant offered to prove by the widow of said Stockwell, that Stockwell, in his life time, paid said note to the plaintiff; but the referees decided that she could not be admitted to testify." 7. "It did not appear from the time of the agreement at the furnace above mentioned, that the plaintiff called on the defendant for pay on the note till after the death of said Stockwell." 8. "The plaintiff proved by his brother, James, that after the death of Stockwell, James, at the request of the plaintiff called at the defendant's house with the note, and asked the defendant to pay the same. The defendant answered, that he thought the note was paid; but said he would go, and see Stockwell's people, and if the note was not paid, he would pay it, —The note was not shown to the defendant." 9. "Since the suit was commenced, the defendant offered the plaintiff that if he would stop the suit, he would pay what could not be gotten from Stockwell's estate on the note."

The defendant filed exceptions to the general report, founded on the above facts contained in the special report of the referees. At the December adjourned term, 1830, the county court rendered judgement, that the report be accepted, and the plaintiff recover the sum of \$34,25 damages, and \$35,58 costs. To which the defendant excepted, and the case was brought to this court.

*Smalley and Adams, for the plaintiff, contended, That a mere request by the surety upon the holder of a note to sue, and the*

holder neglecting to do so, until the principal becomes insolvent, does not discharge the surety. As between the plaintiff and the signers, both are principals, and neither of the signers has the right to control the collection of the note. The surety could apply to chancery to compel the holder to prosecute, or he can pay the note, and pursue the principal himself. We understand the rule of law to be, that nothing can discharge the surety but an agreement upon the part of the holder, made with the principal, to enlarge the time of payment, or some alteration of the original contract.—(2 *Pick. Rep.* 612; 2 *J. C. R.* 563; 4 *Pick. Rep.* 382; 5 *Pick. Rep.* 307; 10 *East Rep.* 35; 1 *Aik. Rep.* 296.)

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The agreement, as stated to have been made by the plaintiff to discharge the defendant, is not binding, because it was a contract without consideration, and not under seal. Even where there is consideration received from one of the signers of a note, and an agreement to discharge him is founded upon such consideration, if there were not a full satisfaction, the agreement is a *nudum pactum*.—(2 *Johns. Rep.* 448; 5 *East*, 230; 7 *Johns. Rep.* 206; 2 *Ver. Rep.* 209; 13 *Johns. Rep.* 87; 1 *Cowen*, 122. Where there is a covenant not to sue, it may be pleaded.—(2 *J. R.* 186; 4 *Bac. Ab.* 266.) It is contended that every contract in writing must be discharged in writing of as high a nature, as that by which the contract is created. A mere parol agreement may be discharged by parol before the cause of action accrues; but not afterwards.—(2 *Con. Rep.* 138; 1 *Swift's Dig.* 300.)

The widow of Stockwell, offered as a witness by defendant to prove the note paid, was rightly excluded by the referees; for she was administratrix of the estate of her deceased husband, and interested: and the wife cannot be a witness for her husband, whether dead or alive; for public policy forbids it.—(2 *Term Rep.* 261; 4 *do.* 671; 6 *do.* 681; 2 *Stark. Ev.* 706; *Phil. Ev.* 64, 66.)

*Hunt, Beardsley and Foster, for the defendant, contended,* That the referees in making their report intended to be governed by the principles of law; but they wholly mistook them. 1. The plaintiff was bound to put the note in suit against Ebenezer Stockwell, the principal, when requested by the defendant, who was surety. And the plaintiff's delay to sue, has discharged the surety from his liability.—(13 *Johns. Rep.* 174; 17 *do.* 384; 10 *do.* 597; 10 *East*, 34 to 38.)

2. The plaintiff choosing not to sue Stockwell, agreed to discharge the defendant from all further liability, and look to Stock-

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well alone. Stockwell was then able to pay, and the plaintiff waited three years, when he died poor, and unable to pay his debts. To make the defendant liable after this, would be unjust.—(*Baily on Bills*, 223 ; 2 *B. and P.* 61 ; 2 *Camp.* 185 ; 16 *Johns. Rep.* 70 ; 8 *Pick. Rep.* 122.)

3. If the defendant, after the death of Stockwell, promised the plaintiff to pay him the note, such promise was without consideration and void.

4. Mrs. Stockwell should have been admitted to testify, that her deceased husband in his lifetime paid the note to the plaintiff. She had no interest in the suit ; and the principle of law, that the wife cannot testify for or against her husband, does not apply to a widow.—(*Phil. Ev.* 68 to 71 ; *Peak's Ev.* 151, 128 ; 11 *Mass. Rep.* 206 ; 2 *Strange*, 504 ; 1 *Hen. and Mum.* 154.)

*Opinion of the Court delivered by*

BAYLIES, J.—The defendant insists, that his requesting the plaintiff in 1825, to sue Stockwell, the principal debtor, and then informing the plaintiff, that he did not wish to stand surety for Stockwell any longer, and the plaintiff's neglecting for three years afterwards to sue Stockwell, till he died insolvent, discharged the defendant from his liability on the note. The surety has certain rights, and privileges, which are secured to him by law. In the case of *Hayes vs. Ward*, (4 *J. C. R.* 132,) *Kent, Chancellor*, says, "it is now considered a settled rule, that a surety may resort to chancery, if he apprehend danger from the creditor's delay, and compel the creditor to sue the principal debtor, though probably he must indemnify the creditor against the consequences of risk, delay, and expense."

If the surety request the creditor to sue the principal debtor, and tender the creditor ample security against risk, delay, and expense in such suit, and the creditor refuse or neglect to sue, I see no good reason, why the surety may not resort to a court of equity to compel a suit for his benefit. But a simple delay of the creditor, ever so long, after being requested to sue, would be no ground for a court of equity to discharge the surety from his liability. If the surety was desirous, that the suit should be commenced against the principal debtor, he had it in his power to apply to a court of chancery, in a reasonable time after his request, to compel the creditor to sue the principal debtor. But if the surety put off his application to the court for three years after his request, he was grossly negligent, and ought not to com-

plain of the negligence of the creditor to sue, in discharge of his own liability. ) If during the delay, the principal debtor fail, and become unable to pay the debt, this will not affect the right of the creditor to call on the surety for payment. I know of no case in chancery, where the court has enjoined the creditor not to sue the surety, simply on the ground, that the creditor has neglected to sue the principal debtor. But if the creditor, without the consent of the surety, varies the contract, or ties up his hands, so that he cannot sue the principal debtor, the court will discharge the surety. These principles are established by the following cases. The liability of a surety in a bond is not discharged by the delay of the creditor in suing for the debt, or by the circumstance of the principal debtor afterwards executing to the creditor another bond for a larger sum.—(*Eyer vs. Everett*, 2 *Russell*, 381.) A court of equity will not relieve a surety by bond upon the ground of the creditor having given time to the principal debtor, unless there has been an express, and positive contract between them for that purpose.—(*Heath vs. Key*, 1 *Young and Jarvis*, 434.) Mere delay of the creditor to call on the principal debtor for payment, does not discharge the surety, unless there is an express contract for that purpose. (*King vs. Baldwin*, 2 *J. C. R.* 357.) But if the creditor by agreement with the principal debtor varies the terms of the contract, by enlarging the time of performance without the consent of the surety, the latter is discharged.—(*Ib.*)

A court of law will not discharge a surety from his liability, where a court of equity would not do it. The same causes for the discharge of the surety are equally available in both courts.

It was decided by this Court, that the case *Paine vs. Packard*, 13 *John. Rep.* 174, is not law in this State—and that bail was not discharged, because, at his request, the creditor did not pursue the principal debtor, and take his property in execution to save the bail harmless.—(*T. Hubbard et al. vs. T. Davis et al.* 1 *Aik.* 296.) Now, if we apply the principles of law to the facts stated above, and relied on by the defendant, we cannot avoid seeing their insufficiency to discharge his liability, as surety to the note in question. Although he requested the plaintiff to sue the principal debtor, he offered the plaintiff no security to save him harmless against the consequences of risk, delay, and expense. And though the plaintiff neglected to sue the principal debtor, as he had a right to do, the defendant also neglected to apply to a court of equity to compel him to sue. If the defendant did not choose to take this course, he might have paid his note to the

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plaintiff, and sued the principal debtor, while he was solvent, and saved himself harmless. But it *seems* that the defendant neglected this till he was without remedy.

The report of the referees shows, that after the note fell due, in the fall of 1823, the plaintiff agreed that he would discharge the defendant from all liability on the note, and would not hold the defendant any longer as surety.—They called evidence of this agreement. The discharge was to be in writing; though it was not then executed. The referees have not found that there was any consideration for this agreement. Yet, if the plaintiff's assurances to the defendant, that he would discharge him, and would not hold him any longer as surety to the note, quieted the defendant, and prevented his applying to a court of equity to compel the plaintiff to sue Stockwell, the principal debtor, and collect the money of him on the note; or prevented the defendant's paying the note, so that he could have recourse to Stockwell for the money, till after his insolvency, and death; perhaps these assurances, so confided in, and producing these effects, should discharge the defendant from his liability. But whether the plaintiff's assurances were confided in, and produced these effects, were facts for the referees to find; and they have not found them. The presumption is, that these facts did not exist. And when the referees considered, that defendant, after the insolvency and death of Stockwell, promised to pay the note to the plaintiff, they might find that the defendant placed no reliance on the agreement of the plaintiff to discharge him, and was not affected by it. And as there was no consideration for the agreement, it should be laid out of the case.

The case also shows that "the defendant offered to prove by the widow of Stockwell, that Stockwell in his life time paid said note to the plaintiff; but the referees decided that she could not be admitted to testify." It does not appear from the report of the referees, nor from affidavits, upon what ground the referees made this decision. The presumption is, that their decision was correct, unless the contrary appear.

The judgement of the county court in accepting the report of the referees, and rendering judgement thereon is affirmed with additional costs.

## EBENEZER WISWELL vs. WILLIAM H. WILKINS.

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Wheret here are three or more tenants in common of land, an action of account at law cannot be maintained by one against another. In such case, if one seek to recover for rents and profits, he must resort to a court of equity.

If the interest of one such tenant in common is separate, and the interest of the others joint, there would be but two parties, and the action of account would lie.

This was an action of *account*, wherein the plaintiff sought to recover of the defendant a portion of the rents and profits of certain lands in St. Albans, from March, 1818, to October, 1827. The defendant pleaded, *that he never was bailiff and receiver*; on which plea issue was joined to the country. On the trial in the county court it appeared in evidence, that the plaintiff was the owner of an undivided half of the premises; and that Tappan and Sewell formerly owned the other half; that the defendant was in possession under Tappan and Sewell when they conveyed their interest therein to N. W. Kingman, and had remained in possession ever since; that in July, 1818, Kingman conveyed one undivided half of his interest in the land to the defendant, and took back a mortgage deed to secure the payment of the purchase money, which had never been paid; and that the defendant had made some repairs on the premises. The court were of opinion that the plaintiff was not entitled to recover, and instructed the jury accordingly, who returned a verdict for the defendant. The plaintiff filed exceptions, and the case was reserved for the opinion of this Court.

BY THE COURT.—This case is virtually decided by one decided last week at Burlington. As it respects the point litigated, there is no difference between this case and the action of account between partners, where more than two persons are concerned in the division of the net avails. Here, according to the facts in the case, accounts of the rents and profits and expenditures must be taken; and the plaintiff is entitled to one half of the net avails, and the defendant to one fourth part, and Mr. Kingman to the residue. Now it is evident, that a division between *Wiswell* and *Wilkins*, while Kingman is no party to the suit, ought not to be, and cannot be, binding upon Kingman. When he sues, he may produce testimony, that will lead to a result very different from that produced by the trial between *Wiswell* and *Wilkins*. The effect would be that two separate recoveries would either leave *Wilkins* liable to pay out more than he ought, or will leave money in his hands, which does not belong to him; and yet

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he or they, to whom it jointly belongs, will have no remedy to obtain it; those judgements, already recovered, being a bar to any further claim. This view shows the absolute necessity of applying to chancery, where more than two are concerned, that one decision may extend to the rights of all concerned, and compel a payment from, and to, each according to their several duties and claims.

The plaintiff's counsel have adduced many authorities, as near in point, as can be found in the books; but they all come short of showing the plaintiff's right to recover in this action. They seem all to be cases, where one sues for his portion of a sum certain, or where the sum can be rendered certain by computation, without any accounting of varied uncertain items, before it could be known what sum would belong to the plaintiff. In the case before us, if the plaintiff's claim had been for the half belonging to him, of a *certain* rent, say one hundred dollars a year, and this liable to no deduction for any expenditures for repairs, or any other object, those authorities would be in point to show the plaintiff's right to recover, in assumpsit, his half of such certain undiminishable rent. But they do not tend to support the action of account, given by our statute, unless that account is to be rendered between two persons, or two parties, only. If there were two defendants, whose interest was entirely joint, that would form no objection to this action. They would form one party. But where the account of uncertain matters is to be rendered between three or more parties, with each a several interest, whether this grows out of a tenancy in common, or a partnership, the remedy of either must be sought in a court of equity.

The judgement of the county court, in  
favor of the defendant, is affirmed.

*Read & Turner*, for plaintiff.

*Stevens & Smith & Royce*, for defendant.



SAMUEL H. BARLOW vs. GARDNER G. SMITH, CHARLES B. JANE'S, FRANKLIN,  
HORACE JANE'S and ASHBEL SMITH. January, 1832.

The parties in a controversy having agreed in writing to submit it to the determination of arbitrators, two other persons, not interested, promised in writing, *that, in consideration of said submission, they would pay whatever sum should be awarded against one of said parties*, it was held that the promise was without consideration, and not binding on the promisors.

This was an action of *assumpsit*. The declaration contained three counts. The first count was as follows :

"For that the said defendants, heretofore, to wit, on the first day of May, A. D. 1829, at St. Albans aforesaid, in consideration that the plaintiff would submit certain matters of difference then existing between the said plaintiff and the said *Charles B. and Gardner G.* concerning the said plaintiff's leasing his, the said plaintiff's store to the said *Charles B. and Gardner G.*, and concerning the contracting to purchase the goods of him the said plaintiff by the said *Charles B. and Gardner G.*, to the arbitrament, decision, and final determination of Luther B. Hunt and George Green, they the said defendants assumed upon themselves, and then and there jointly and severally promised the plaintiff to pay him all such sum or sums of money as should be awarded by said Hunt and Green to be paid to the plaintiff by the said *Charles B. and Gardner G.* in 90 days from the said 1st day of May, A. D. 1829. And the plaintiff further says that he, relying on, and trusting to, the aforesaid promise and undertaking of the said defendants so made by them as aforesaid, did afterwards, to wit, on the same day and year last aforesaid, at St. Albans aforesaid, submit said matters of difference then existing between the plaintiff and the said *Charles B. Janes and Gardner G. Smith* concerning the plaintiff's leasing his store to the said *Charles B. and Gardner G.*, and concerning the contracting to purchase the goods of the said *Barlow* by the said *Charles B. and Gardner G.*, to the decision, arbitrament, and final determination of said Luther B. Hunt and George Green : and the said Hunt and Green afterwards, to wit, on the day and year last aforesaid, at St. Albans aforesaid, assumed upon themselves the said duties of arbitrators in the matters aforesaid, between the said plaintiff and the said *Charles B. and Gardner G.* And the said plaintiff and said *Charles B. and Gardner G.* then and there, on the day and year last aforesaid, at St. Albans aforesaid, appeared before said Hunt and Green as such arbitrators in said matters of difference aforesaid, and then and there submitted said matters of difference aforesaid, to the final determination, award and arbitrament, of said Hunt and Green. And the said Hunt and Green then and there, so being arbitrators as aforesaid, having taken into consideration the said matters of difference so existing between the plaintiff and said *Charles B. and Gardner G.*, and so submitted to them, the said Hunt and Green, as aforesaid, did then and there award, determine and adjudge, that the said *Charles*

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*B. and Gardner G.* should pay the plaintiff the sum of one hundred and fifty dollars in ninety days from said first day of May, A. D. 1829, in full satisfaction and discharge of said matters of difference aforesaid ; of all which the said defendants then and there, to wit, on the day and year last aforesaid, at St. Albans, had due notice. Yet the said defendants, not regarding their said promise and undertaking so made by them as aforesaid, have not as yet paid to the plaintiff said sum of one hundred and fifty dollars or any part thereof, though often requested so to do, to wit, at St. Albans aforesaid, to wit, on the 20th day of August, A. D. 1829."

The other two counts, being for the same object, need not be noticed, except the considerations for the promises. In the second count the consideration was set forth as follows :

" And also for that whereas the defendants heretofore, to wit, on the 1st day of May, A. D. 1829, at St. Albans aforesaid, in consideration that the plaintiff and the said *Charles B. and Gardner G.* would submit certain of the matters of difference then existing between the said plaintiff and the said *Charles B. and Gardner G.* concerning the leasing of the said plaintiff's store to the said *Charles B. and Gardner G.*, and the contracting to purchase the goods of the said plaintiff by the said *Charles B. and Gardner G.*, to the final decision, award, arbitrament and determination, of Luther B. Hunt and George Green, they the said defendants assumed upon themselves, and then and there jointly and severally promised the plaintiff to pay him," &c.

*In the third count :—*" And also for that whereas the said defendants heretofore, to wit, on the 1st day of May, 1829, to wit, at St. Albans aforesaid, in consideration that the plaintiff and the said *Gardner G. and Charles B.* would submit certain other matters of difference then existing between the said plaintiff and the said *Charles B. and Gardner G.* concerning the leasing of the said plaintiff's store by the said *Charles B. and Gardner G.*, and the contracting to purchase the goods of the said plaintiff by the said *Charles B. and Gardner G.*, and in consideration that the said plaintiff and the said *Charles B. and Gardner G.* then and there mutually agreed to relinquish the contract in full relating to said store and said goods, and submit the same to the determination of Luther B. Hunt and George Green to say what (if any thing) the said *Charles B. and Gardner G.* should pay the said plaintiff, and he the said plaintiff to keep the goods and relinquish the lease of said store ; and also that the said plaintiff and the said *Charles B. and Gardner G.* then and there mutually agreed to abide the award of the said Hunt and Green, and that the same should be a full and final settlement of said difficulty, they the said defendants assumed upon themselves, and then and there faithfully promised the plaintiff to pay him," &c.

The general issue of *non assumpsit* was pleaded ; and the following bill of exceptions gives a history of proceedings in the action :

" This was an action of *assumpsit* on an agreement to perform the award of arbitrators. Plea, *non assumpsit*, and issue to the jury. On the trial of the cause before the jury on the issue aforesaid, the plaintiff offered in evidence an agreement in writing entered into by the plaintiff and *Charles B. Janes* and *Gardner G. Smith*, two of the defendants, dated May 1st, 1829, by which they agreed to submit to the determination of *Luther B. Hunt* and *George Green*, as arbitrators, certain matters of difference therein named ; also a written agreement on the back of said submission, signed by *Charles B. Janes*, *Gardner G. Smith*, *Horace Janes*, and *Ashbel Smith*, as follows : " In consideration of the within submission, we hereby jointly and severally agree to pay whatever sum may be awarded (if any) to said *Barlow* within ninety days from this 1st of May, 1829." And also upon the same paper an award of said arbitrators, awarding to said *Barlow* one hundred and fifty dollars ; all of which are referred to and made a part of the case. To the admission of this evidence the defendants objected, and contended that the said writing ought not to be admitted in evidence : *First*, because the contract declared on and the contract offered in evidence materially varied. *Secondly*, because there is no consideration for the contract signed by the defendants. But the court overruled the objections, and admitted the evidence. The defendants then contended, and so requested the court to charge the jury, that there was no consideration for the contract signed by the defendants. But the court charged the jury that there was a sufficient consideration for the contract made by the defendants ; and the jury thereupon found a verdict for the plaintiff."

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The submission and endorsements thereon, referred to, and made a part of the case, are as follow :

" Whereas a misunderstanding has arisen between *Samuel H. Barlow*, and *Charles B. Janes* and *Gardner G. Smith* concerning the leasing the said *Barlow's* store by the said *Janes* and *Smith*, and the contracting to purchase the goods of the said *Barlow* by the said *Janes* and *Smith*, and it is agreed between the parties to relinquish the contract in full, and submit to the determination of *George Green* and *Luther B. Hunt* to say what (if any thing) the said *Janes* and *Smith* shall pay the said *Barlow*, and he, the said *Barlow* to keep the goods and relinquish the lease of said store. We hereby mutually agree to abide the award of the said *George* and *Luther*, and that the same shall be a full and final settlement of said difficulty."

"*Samuel H. Barlow*,  
"*Charles B. Janes*.  
"*G. G. Smith*."

" *St. Albans*, May 1, 1829."

" In consideration of the within submission we hereby jointly and severally agree to pay whatever sum may be awarded (if

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“ any) to the said *Barlow*, within ninety days from this 1st day of  
“ May 1829.

*G. G. Smith,*  
*Charles B. Janes,*  
*Horace Janes,*  
*Ashbel Smith.”*

“ Having taken into consideration the subject matter of the  
“ within submission, we do award, that the said *Charles B. Janes*  
“ and *Gardner G. Smith* pay to the said *Samuel H. Barlow* one  
“ hundred and fifty dollars in ninety days from this first day of  
“ May, 1829.

*George Green,* } Arbitrators.  
*Luther B. Hunt,* }

*Smalley and Adams, for plaintiff,* contended,—1. That there was no variance between the written evidence admitted to the jury, and the several counts in the plaintiff’s declaration.—2. That the written contract of the defendants upon the back of the submission was not void for want of consideration, but was legal security for the performance of the award in 90 days from date, on the part of the two first signers.

*Brown and Swift, for defendants,* contended, That there was a material and fatal variance between the contract set forth in the plaintiff’s declaration, and the one offered by him in support of said declaration, both as to the time of the making of said pretended contract, and the consideration on which it was founded. 1. As to the time of making said contract. The declaration alleges the contract to have been made prior to the submission. The contract offered in evidence appears to have been made subsequently to the submission. 2. The contract set forth in the declaration is founded on the consideration that the plaintiff *would submit*. The contract offered in evidence is founded on the consideration that the plaintiff and *Charles B. Janes* and *G. G. Smith* *had submitted*. For this variance the evidence ought to have been rejected by the court. 1. *Chit. Plead.* 304; *Colt vs. Root*, 17 *Mass. Rep.* 229; *Church vs. Wilkins*, 1 *T. R.* 447; *Penny vs. Porter*, 2 *East*, 2; *Hockins vs. Cooke*, 4 *T. R.* 314; *Buckley vs. London*, 2 *Con. Rep.* 404; *Roberts vs. Lynch*, 18 *John. Rep.* 451; *Amory vs. Merryweather*, 2 *B. and C.* 573, (9 *Com. Law Rep.* 183.)

2. The contract offered in evidence is void for want of consideration. The contract professes to have been made by persons, who had no interest in the controversy, and in aid of a sub-

sisting liability on the part of *Charles B. Janes* and *Gardner G. Smith*, and is made without any consideration moving to the said *Horace Janes* and *Ashbel Smith*, and without forbearance or prejudice on the part of the plaintiff. The pretended consideration is no more the act of *Barlow*, the plaintiff, than of *C. B. Janes* and *G. G. Smith*.—*Hayes vs. Warren*, 2 *Strange*, 933; *Comstock vs. Smith*, 7 *John. Rep.* 87; 1 *Chit. Plead.* 397; 1 *Bac. Abr.* 174; 1 *Swift's Dig.* 203.

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3. A consideration is as essential to a written contract coming within the provisions of the statute of frauds, as to any other.

4. But suppose the legal effect of the contract set forth in the declaration, and the one offered in evidence, to be the same, still it is contended that the contract is void for want of consideration: 1. Because the submission in this case was mutual, and equally beneficial to both parties, and cannot, therefore, amount to a sufficient consideration to support a contract made by a stranger to the controversy in favor of either party. 2. Because the arbitrators in making their award could be governed only by the submission, and the rights of the plaintiff growing out of the award are precisely the same as if no contract had been made. 3. Because no benefit results by the submission to two of the defendants, *H. Janes* and *A. Smith*; nor does the plaintiff by said submission forego any right or advantage which he might otherwise have. 4. Because the submission is not binding on the parties; either having the right to revoke at any moment before the publication of the award. 5. Because the contract is not mutual and equally beneficial; the plaintiff having the right of rescinding the contract at any time, while two of the defendants, *H. Janes* and *A. Smith*, have no such right. 6. Because such contract is wholly useless and unnecessary to the validity of the award, and if binding, would give the plaintiff a double remedy for the same cause.

*BAYLIES, J., delivered the opinion of the Court.*—It appears that on the 1st of May, 1829, *Samuel H. Barlow*, the plaintiff, and *Charles B. Janes* and *Gardner G. Smith*, two of the defendants, made a written submission of certain matters of difference between them to the determination of *George Green* and *Luther B. Hunt*, arbitrators; and in their submission mutually agreed to abide the award of the said *George* and *Luther B.*, and that the same should be a full and final settlement. This submission was not made a rule of court, but was simply the act of the parties. It was not under seal, and the parties relied on their mutual

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promises to carry it into effect. Also this submission was revocable at the pleasure of either party at any time, before the award was made ; and the party revoking, in an action on his promise, would be liable to nominal damages only, unless the other party had put himself to trouble and expense in making preparations for a hearing before the arbitrators. While these were the rights and liabilities of the parties to the submission, the defendants signed the agreement, to wit ; “ In consideration of the within submission, we hereby jointly, and severally, agree to pay whatever sum may be awarded (if any) to the said *Barlow* within ninety days from this 1st day of May, 1828.”

On trial of the action, in the court below, the plaintiff offered this agreement in evidence to the jury ; to the admission of which the defendants objected : first, for *variance* ; and secondly, for *want of consideration* : but the court overruled the objections, and admitted the agreement. Whether the county court erred in this is now to be determined.

Every agreement not under seal is, in law, regarded a parol agreement, and will not be binding unless made upon adequate consideration. \ That consideration must generally be, either a matter of advantage to the promisor, or detriment to the promisee, or both, brought about in consequence of a previous request, express or implied, of the promisor \ (*Fell on Guarantees*, 3, 4.) / But in addition to this, if a man be under a *moral* obligation, which no court of law, or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration : as if a man promise to pay a just debt, the recovery of which is barred by the statute of limitation ; or if a man, after he comes of age, promises to pay a meritorious debt contracted during his minority, but not for necessities ; or if a bankrupt in affluent circumstances, after his certificate, promise to pay the whole of his debts ; or if a man promise to perform a secret trust, or a trust void for want of writing by the statute of frauds. In these, and many other instances, though the promise gives a compulsory remedy, where there was none before, either in law or equity ; yet if the promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind are a sufficient consideration.—(1 *Tidd*, 379 ; *Cowper*, 290.) So a promise for promise, made at the same time ; or *forbearance* to sue a legal demand, is a sufficient consideration.—(1 *Saund.* 210 ; *Hardres*, 103.) But a promise made on a *past* consideration is not binding on the defendant.—(2 *Strange*, 933.) If an agreement be all on one side, and the plaintiff be not bound by it,



it is a *nudum pactum*, and the defendant is not bound.—(3 T. R. 653.) So where the plaintiff declared, that in consideration he, *at the instance of himself*, had taken pains to reconcile the difference between J. S. and others, the defendant promised, &c., it was adjudged to be a *voluntary courtesy*, and not a sufficient consideration for the defendant's promise.—*Style's Rep.* 465.) If we apply the principles of law to the agreement of the defendants, the inadequacy of its consideration must be obvious. This agreement was not made in consideration, that at the special instance and request of the defendants, the plaintiff *had* or *would submit* to arbitrators; nor in consideration, that the plaintiff *would not revoke* the submission; nor in consideration of *forbearance* on the part of the plaintiff to sue; nor in consideration of any *moral obligation* on the part of the defendants, which a court of law or equity could not enforce; nor in consideration of *any promise* of the plaintiff to the defendants, made at the same time: but it was made in consideration of the *submission*; that is, in consideration of *what had been written and signed* by the plaintiff and two of the defendants, on the other side of the paper. But this must be viewed as a *past* consideration, and not sufficient to support the agreement of the defendants. As two of the defendants were not parties to the submission, they could receive no benefit from it: nor was the plaintiff prejudiced by their making it the consideration of their agreement; for his rights and interest in the submission remained precisely as they were before. And their agreement can only be sustained on a consideration of benefit to the defendants, or detriment to the plaintiff; but in this case no such consideration appears.

It also *seems*, there is a material variance between the contract set forth in the plaintiff's declaration, and the one offered in evidence; but it is not necessary to decide this, inasmuch as the defendants' agreement had no sufficient consideration to support it.

The judgement of the county court is reversed, and a new trial granted.

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JOHN BARNEY vs. JOSEPH WEEKS.

Where an officer was commanded in a writ to attach the goods and chattels of a defendant to the value of twenty dollars, and afterwards made his return on the writ that he had, by the directions of the plaintiff, attached all the hay, grain, oats and peas in the defendant's barn,—it was held that he was estopped from saying there was no such property there, and that the command in the writ and return thereon were *prima facie* evidence that the property attached was worth twenty dollars.

A creditor having caused certain personal property to be attached by virtue of a writ of attachment against his debtor, afterwards took out an execution on the judgement rendered in said suit, and in due season delivered it to the sheriff who made the attachment, with directions to levy it on the property attached, and the sheriff without the consent of the creditor, delivered the execution to a constable, who made a return thereon, that he had repaired to the dwelling house of the debtor, demanded the property, and could not find any whereon to levy the execution,—it was held that the sheriff was liable.

This was an action on the case against the defendant, as sheriff of Franklin county. The declaration alleged that the plaintiff had theretofore delivered to the defendant a writ of attachment against one Enoch Sawyer to be served and returned according to law ; that afterwards the defendant served said writ by attaching all the hay, grain, oats and peas in the debtor's barn, to wit, five tons of hay, twenty shocks of wheat in the straw, fifty shocks of oats in bundle, and twenty bushels of peas unthreshed, the property of said Sawyer ; that afterwards the plaintiff recovered judgement in the suit for \$9,81 damages, and \$2,69 cost, and prayed out an execution thereon, and, within thirty days from the rendition of the judgement, delivered it to the defendant to be executed ; that the defendant did not take said property in execution, nor keep it thirty days after the rendition of the judgement, that the plaintiff might take it in execution, but released and discharged it from the attachment ; and delivered the execution to one Withey, a constable, who within sixty days from its date returned it to the justice from whom it issued, wholly unsatisfied. The defendant pleaded the *general issue*, which was joined to the country. The plaintiff, to support the issue on his part, gave in evidence the copy of the writ against Sawyer before mentioned, and the return thereon signed by a deputy of the defendant. The writ was in the common form, and the officer serving the same was directed to attach property to the value of *twenty dollars*. The return was as follows : " Franklin County, ss." " Then  
" served this writ by attaching *all the hay, grain, oats and*  
" *peas*, now in the barn on the premises on which the defendant  
" now lives in St. Albans, as the property of the within named  
" Enoch Sawyer, by directions of the plaintiff ; and at the same  
" time I left a true and attested copy of this writ in the hands

“ of the wife of the within named defendant ; and have also left  
 “ one other true and attested copy of this writ with the town clerk  
 “ of said town of St. Albans, with a list of the property so at-  
 “ tached, and this my return thereon endorsed.

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Attest, *B. Shepard, Sheriff's deputy.*”

The plaintiff also gave in evidence a copy of a record, from which it appeared the plaintiff had recovered a judgement in the suit against Sawyer for \$9,81 damages, and for \$2,69 cost ; and had within thirty days from the rendition of the judgement taken out an execution thereon. He also proved he had delivered it to the defendant, within thirty days from the rendition of the judgement, to levy, serve and return according to law, with the following directions endorsed : “The officer holding this execution is directed to levy on the hay, grain, oats and peas attached on the original writ.”

“ *George W. Foster, attorney for plaintiff ;*”—that with this endorsement on said execution, *Weeks*, without the direction of the plaintiff, delivered it to one S. Withey, constable of St. Albans, in said county, who made the following return thereon : “ St. Albans, 17 November 1827 ; Then I repaired  
 “ to the dwelling house of the within named defendant, and made  
 “ demand for the property above described, and could not find any  
 “ whereon to levy this execution. I therefore return this execu-  
 “ tion into the office wholly unpaid,”

“ Attest, *S. Withey, constable ;*”—and that on the 20th November, 1827 said execution was returned into the office of said justice of the peace.

Upon this evidence the plaintiff rested his cause, and contended, and so requested the court to charge, that he was entitled to recover. But the court charged the jury, *that upon this evidence alone, the plaintiff was not entitled to recover ;* and the jury found a verdict for the defendant. To which charge the plaintiff excepted, and the case was removed to this Court, for them to consider, whether there was error, or not, in this charge of the court below.

BAYLIES, J.,—*delivered the opinion of the Court.*—It seems, that the defendant, being sheriff of the county of Franklin, was, by the writ of attachment, which appears in this case, “commanded to attach the goods, chattels, or estate, of *Enoch Sawyer*, of St. Albans, to the value of twenty dollars, and him notify thereof according to law ; and for want thereof, take his body &c.” The defendant, by his deputy, served the writ, and made his return, that he attached *all the hay, grain, oats and peas*, in the barn on the

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premises where the defendant lived ; also that he did this by the direction of the plaintiff. By this return the defendant is estopped from saying there was *no hay, grain, oats, or peas* in the barn. The return shows there was some of each. And as the command in the writ was to attach *to the value of twenty dollars*, the presumption is, that the officer did his duty, and the articles attached were of that value. I consider, *the command* in the writ and *officer's return* are *prima facie* evidence, that hay, grain, oats and peas were attached of the value of twenty dollars. To vary this, the burthen of proof was on the defendant. He might show, that the plaintiff directed him to attach the articles, and that their value was much less than twenty dollars. But it is doubtful whether the officer's return, that he was directed by the plaintiff to make the attachment, is proper evidence of the fact. The officer may certify his own doings, by which he is bound ; but it is doubtful, whether he can make evidence for himself by certifying the doings of the plaintiff. But, if we admit he could do it, there was no evidence given by the defendant tending to show, that the articles attached were of less value than twenty dollars. So, the *prima facie* evidence of the plaintiff, that the articles attached were of that value, has not been overcome by the defendant.

It was the duty of the defendant, as sheriff, to have held the hay, grain, oats, and peas which he attached as aforesaid, for thirty days from the time final judgement was rendered in the suit. And if the plaintiff did not within the thirty days take the hay, grain, oats and peas, in execution, the same would be discharged from the process.

The plaintiff's evidence shows, that he regularly proceeded to final judgement in the suit, and in due season took out his execution on the judgement, and delivered it to the defendant, who was sheriff, and to whom it was directed, to collect and return, with written directions on the execution to levy on the hay, grain, oats and peas attached on the original writ. By this the plaintiff continued his *lien* upon the property attached, and the defendant could not shift off his responsibility for the loss of it, by delivering the execution to the constable for him to make a *non est inventus* as to property. In short, the plaintiff showed sufficient evidence *prima facie* to entitle him to recover, and

The judgement of the county court  
is reversed, and a new trial granted.

Geo. W. Foster, for plaintiff.

Smalley and Adams, for defendant.

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A, an infant contracted to labor for W one month for fifteen dollars, five of which were to be paid in cash, and the remainder in cloth. A having performed the stipulated service, W paid him the five dollars in money, and gave him an order on a third person for the cloth.—It was held that A was not bound by the receipt of the order, but might avoid the contract, and recover on a *quantum meruit* for work and labor such sum as his services were worth, deducting the five dollars.

All contracts of an infant, whether executed or not, if not for necessities, may be avoided by him, unless he has confirmed them after arriving at full age.

This was an action of *assumpsit*, on an order for ten dollars, with a second count for work and labor. Plea, *non assumpsit*, and issue to the court. On trial it was proved to the satisfaction of the court, that in the summer of 1827, the plaintiff made a contract with the defendant to labor for him in haying one month for fifteen dollars, five of which the plaintiff was to receive in money, which was paid, and ten in fulled cloth of Anson Field, of St. Albans, for which the defendant was to give the plaintiff an order on said Field; and that the plaintiff performed the labor contracted for. Some time in the first part of Sept. 1827, the defendant told the plaintiff he was going to settle with Field, and then would give him an order for the \$10 in cloth; and upon that occasion, the plaintiff told the defendant, he need not bring or send the order to him, unless he should be coming where he lived, or had an opportunity of sending it by some one; but that the plaintiff would call and take it. About the middle of September, the plaintiff called at the defendant's house for the order, and enquired of one Anna Brush, who was the defendant's house-keeper for it, and she informed him, that the defendant was at work in the woods, and referred the plaintiff to him. On the first of October the defendant wrote the order, and left it with the said Anna Brush, who was still his house-keeper; and as he was going from home, directed her to let the plaintiff have it, if he called, for the cloth was ready. On the 28th of October the plaintiff called at the defendant's house, and took the order, and the defendant then told the plaintiff that the order had been ready for some time, and he, the defendant said, either that he had forgotten, or that he had neglected, to send it to the plaintiff, and that he wished the plaintiff to take it, and call and get the cloth. Some time in the month of September, the defendant and Field settled, and Field owed him fifty or sixty dollars. The defendant told Field he should draw on him for ten dollars in cloth, and Field replied that the cloth would be ready at any time. On the 2d day of November, Field absconded, and left the state. It was not prov-

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ed, that the order was ever presented to Field, or at his residence, for payment: but it did appear to the satisfaction of the court, that *the defendant was notified that it was not paid*, soon after Field absconded, though the precise time was not proved. It appeared that the plaintiff and defendant and Field, until he absconded, all resided within a few miles of each other. It was also proved that the plaintiff at the time of making the said contract, and for two or three years after, was a minor. All the evidence was given in support of the second count. Upon this proof, the court rendered judgement for the plaintiff, and assessed the damages at \$11,90. To which decision of the court the defendant excepted, and the case was brought here for revision and correction of errors in law.

*Smalley and Adams, for defendant* insisted, 1. That the receipt of a bill or note implies an undertaking from the receiver, to present the one for acceptance, and each for payment, and to give notice to the drawer or endorser of a failure in the attempt to procure a proper acceptance or payment; and a default in any of these respects makes the bill or note operate as a satisfaction of any debt, or demand for which it was given.—(*Bailey on Bills*, 124.) In this respect there is no difference between the order in question, and any inland bill.—(*1 Ver. Rep.* 136.)

2. It results as a necessary inference from the general doctrine, that one who receives a bill or note of a third person for goods sold, cannot resort to the consideration for which the bill or note was received, before he has performed his duty, as to demanding payment, &c. on such bill, or note.

3. Infancy of the plaintiff can have no effect upon the rights of the drawer. Infancy is a privilege, which is given "as a shield, and not as a sword."—(*3 Bur. Rep.* 1794.) No case can be found, where an infant has been permitted to *rescind* an *executed* contract, unless all parties could be restored to their former situation. If the law were otherwise, no man would sell to an infant an article; because the infant after having paid his money, and sold or lost the article purchased, might demand and recover the original purchase money. In this case the plaintiff kept the order until the drawee was bankrupt, by which the defendant was prevented from withdrawing his funds from Field's hands—and now the plaintiff wishes to resort to his original demand.

*Brown and Bascom, for plaintiff*, contended, 1. That the or-

der referred to in the case, is not in the nature of a bill of exchange, and, therefore, not within the rules of the law merchant. This order was a direction for Field to let the holder have ten dollars in fulled cloth, and not for the payment of money. No consideration is expressed in the order, nor can any be fairly implied from its tenor. It would no more bind the holder to diligence required by the law merchant, than a verbal order. Suppose the defendant had told Field to deliver ten dollars worth of cloth to the plaintiff, and had agreed orally with the plaintiff to call and get it, would the court extend the law merchant to this mere verbal agreement? This case does not compare with a promissory note payable in specific articles. Where a note is endorsed, the endorser parts with the evidence of his debt, and all right to enforce payment, or to discharge the demand. If the law protects the equitable interest of the holder, it is perfectly just that he should be required to use due diligence. Suppose the defendant had taken a note of Field on settlement for the balance due to the defendant, the order to the plaintiff would give him no control over such note: the defendant might receive the full amount of the note notwithstanding the order to the plaintiff. To extend the law merchant to orders of this description would be new, and extremely embarrassing.—(*Chit. on Bills*, 32.)

2. It appears from the case, that the plaintiff was a *minor* at the time of making the contract. It is a general rule that infants are not liable for their contracts express or implied—and all contracts by infants, except for necessities, when there is no semblance of benefit, and they do not acquire any thing, but contract to pay, or do something, or to transfer property, are either void, or voidable, according to their nature.—(1 *Black. Com.* 492–3 ; 1 *Swift's Dig.* 55.) An infant may avoid all his contracts against his interest. The contract of the plaintiff to receive cloth for his labour of Field was against his interest, and he might avoid it.—(1 *Swift's Dig.* 56 ; 6 *Mass. Rep.* 78 ; 13 *Mass. Rep.* 204.) An infant loses nothing by his laches.—(3 *Bac. Abr.* 128.) He cannot endorse a bill, or note.—(*Chit. on bills*, 20.)

BAYLIES, J., *delivered the opinion of the Court.*—In the summer of 1827, the plaintiff made a contract with the defendant to labour for him in haying one month, and therefor the defendant agreed to pay the plaintiff five dollars in money and ten dollars in fulled cloth ; and draw an order on Anson Field for the cloth. The plaintiff performed the labor according to his contract ; and

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the defendant paid the five dollars in money, but did not pay the fulled cloth. On the 28th of October, 1827, the plaintiff received an order on Anson Field for the cloth, and on the 2d of November, following, the said Field absconded, and left the state, before the plaintiff presented the order to him for payment; and the plaintiff gave the defendant immediate notice of non-payment. This action is brought to recover compensation for the work and labor of the plaintiff, who was a minor under twenty one years of age, when he made the contract and performed the services. The question is, whether the plaintiff, under existing circumstances, has a right to avoid his contract, and recover on his general count for work and labour.

It is a well established rule of law, that an infant has a right to avoid his contracts : and it matters not, whether his contract is fair, or unfair, he has a right to rescind it. But to this rule there are some exceptions. An infant may bind himself to pay for his necessary meat, drink, apparel, physic, and his good teaching and instruction, whereby he may profit himself afterwards. He may also, if married, take up provision for his wife and children. But it must appear that the things were actually necessary, of reasonable prices, and suitable to the infant's degree, and estate—considerations, which regularly must be left to the jury.—(*Bingham on Infancy*, 86.) If the jury find that the things were necessities, and of a reasonable price, it shall be presumed they had evidence for what they thus find; and they need not find particularly what the necessities were, nor the price of each. Also, if the plaintiff declares for other things as well as necessities, or alleges too high a price for those that are necessary, the jury may consider of those things that were really necessary, and of their intrinsic value; proportioning the damages accordingly.—(*Cro. Jac.* 560.) The question of necessities is to be governed by the *real*, not the *ostensible*, circumstances of the infant.—(*Peake*, 229; 1 *Esp. Rep.* 211.) But if an infant resides with, and is subject to a parent, master, or guardian whose duty it is to provide necessities, and he is able and willing to provide them according to the degree and estate of the infant, and without the approval of such parent, master, or guardian, the infant purchases necessities for himself, he is not liable to pay for them.—(2 *Black. Rep.* 1325; 9 *Johns. Rep.* 141; 16 *Mass. Rep.* 32; *D. Chip. Rep.* 252.)

But the defendant insists that, “no case can be found, where an infant has been permitted to rescind an *executed* contract, un-



less all parties could be restored to their former situation." If this be true, then the privilege of infants is not worth possessing. According to this notion of the law, an infant, who has, by deed, conveyed his real estate worth \$5000, for \$500, and has spent the money, cannot rescind the contract, because he cannot refund the \$500, and place the purchaser in his former situation. This cannot be law. I understand the books to say, that a title to land derived from an infant by *fine*, *recovery*, *statute*, or *recognizance*, may be avoided by the infant in his minority—the two first by writ of error; and the two last by *audita querela*.—(*Bing.* 57, 8.) If an infant make a *feofment*, he can avoid it by entry, either within age, or at full age.—(*Ib.* 60). As to all other conveyances in *pais*, whether in fee, tail, for life, or years, it seems the infant, or his representatives, may avoid them by *trespass*, *assize*, or *entry*, within, or after age.—(*Ib.* 62.) Where an infant, by bargain and sale, deeded his land to A, and, after he came of age, by another bargain and sale, deeded the same land to B, it was adjudged, that the last deed avoided the first.—(11 *John. Rep.* 539; 14 *do.* 124.) An infant shop-keeper, who contracts, for goods to sell again, in the course of his trade; or an infant, who contracts for goods, not necessities; or who borrows money, though he afterwards actually lays it out in necessities, is not liable for the goods sold, or money lent.—(*Bing.* 29.) When the general issue of *non assumpsit* is pleaded, infancy may be given in evidence to avoid the promise or undertaking of the defendant.—(*Ib.* 63.) An infant's bond, or covenant, under seal, may be avoided by a plea of infancy.—(*Ib.* 63.) But infancy cannot be given in evidence under the plea of *non est factum*. An infant owned a promissory note, which he transferred to A for a worthless watch. The next day after the contract was executed, the infant tendered the watch to A, and demanded the note; but A refused to receive the watch, or to deliver up the note. It was adjudged, that the tender of the watch, and demand of the note by the infant, was an avoidance of his contract.—(13 *Mass. Rep.* 204.) This was a contract *executed* by both parties, and afterwards avoided by the infant. An infant received \$50 in full for an assault and battery on his person, and gave a discharge to one of his assailants. It was considered, that he might avoid the discharge. Here was another contract *executed*, and avoided by the infant. *Parsons, Ch. J.*, in delivering the opinion of the court, in this case, says; "An injury done to an infant by assaulting and beating him, vests in him a right of action, to recover adequate

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damages. He is not however supposed to have capacity to ascertain the damages, and, therefore, if he release them, he may avoid the release. On the same ground, if he submit his rights to arbitration, he will not be bound by the award, from a presumed incapacity to choose suitable arbitrators. For the same reason, if he attempt himself to ascertain the damages, he cannot be obliged by this act, although he may have received the damages he claims. They may be extremely inadequate to the injury, and the law will protect him, as well against himself as against others.—(6 *Mass. Rep.* 78.) The law makes no distinction between contracts *executed*, and contracts *not executed*, as to their being voidable. Every personal contract to which an infant is a party, if not entered into for necessities, which he has actually received, may be avoided by him, whether it be fully executed or not, unless he has confirmed such contract by his acts, or words, after he arrived to the age of twenty-one years.

In the case under consideration, the plaintiff was an infant, when he made the contract, and continued to be so for two or three years afterwards; therefore, he could not confirm his contract before he brought this action. If the plaintiff had received the fulled cloth of Anson Feld, on the defendant's order, and the contract had been fully executed; yet, if the fulled cloth was not necessary for the plaintiff, he had a right to avoid the contract, and submit his claim to a court and jury to ascertain what he merited for his work and labour. This is the privilege, which the law affords to an infant, on account of his supposed incapacity to judge of the value of things. But so far as an infant is capable of distinguishing between right and wrong, it is as much his duty to conduct himself honestly, as it is the duty of an adult; therefore, in this case, if the plaintiff had received the cloth, and had not offered to return it to the defendant, but intended to keep it, and recover the full value of his work and labour, it would be a gross fraud, which should not be tolerated. To prevent such fraud, it might be right for the court to direct the jury according to the principles of law in the above case, (6 *Mass. Rep.* 78;) that is, if the five dollars, and cloth received by the plaintiff, were equal in value to the plaintiff's work and labour, then he should recover only nominal damages: but if they were of less value than the work and labour, the plaintiff should recover the difference. But where an infant is defendant, and would avoid his contract by infancy, his defence cannot be avoided by the plaintiff's showing, that the infant intends a fraud upon him. If the

plaintiff wants relief against fraud, he may resort to a court of equity. In some cases, where the infant rises above the age of discretion, a court of equity will relieve against his fraud.—(*Bing.* 113.)

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I have proceeded thus far, on the supposition that this contract, between the plaintiff and defendant, was fully executed. But the case shows that this was not the fact. The plaintiff never received the fulled cloth ; but he received an order for the cloth in pursuance of his contract. So long as this contract remained in force, the order was a sufficient authority for the plaintiff to have received the cloth : but his authority ceased the moment the plaintiff avoided his contract ; and then the defendant became entitled to the order. To set up the receipt of this order by the plaintiff in bar of his right to avoid his special contract, cannot be allowed. If the law implied a promise on the part of the plaintiff, when he received the order, *to use due diligence in presenting the order for payment, and giving notice back of nonpayment*, this implied promise may be avoided by infancy, as well as the *express* promise, to take cloth in payment. An infant cannot be a party to a bill of exchange ; and if he endorse a negotiable note, he may avoid his endorsement by infancy. Whether the law merchant would apply to an order of this description, in the hands of an adult, and would require him to use diligence in presenting the order for payment, and giving notice of nonpayment, is not necessary to decide in this case.

The judgement of the county court  
is affirmed with additional costs.



LEVI HAPGOOD vs. AUGUSTUS BURT.

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When one enters on land claiming title thereto, his seizin extends to the whole parcel to which he claims title. But

When one not claiming any right to land enters thereon, he acquires no seizin but by the ouster of him who was seized ; and to constitute such an ouster, the disseizor must have the actual exclusive occupation of the land, claiming to hold it adverse to him who was seized ; or he must actually turn him out of possession.

When a disseizor claims to be seized by virtue of his entry and occupation, his seizin cannot extend further than his actual exclusive occupation.

To constitute a disseizin of the owner of uncultivated lands by the entry and occupancy of one not claiming title, the possession must be of such notoriety that the owner may be presumed to know there is a possession adverse to his title.

This was an action of *ejectment*, for lands in Sheldon, in the county of Franklin ; and the parties having agreed on three per-

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sons as referees, the county court by their rule referred the action to them to report thereon. The referees having fully heard the parties, reported, That "on trial, the plaintiff claimed the land described in his declaration by possession, and proved that in 1804 or 1805, he and others made coal on a piece of land then wild—parcel of lots no. 33, 38, and 57, which lots cornered together. The land thus claimed, by cutting off the timber for coal, amounting to twenty or thirty acres, and embracing part of lots no. 33, 38 and 57, was called the "back lot," and was enclosed by a ledge on part of one side, and by a log and brush fence on the other sides, as early as 1810. From 1810, till the defendant entered upon and took possession of that part of the "back lot," which is on lot no. 33, in 1825, the plaintiff occupied the "back lot" as a pasture, called it his "back lot," and occasionally, during all that period of time, repaired the fences around it. The defendant then produced the original charter of the town of Sheldon, by which it appeared that Philip Allen, sen., Philip Allen, jr., Elijah Allen, Richard Allen, John Allen, and Henry Allen, were original proprietors. He then produced a deed from Philip Allen, jr., Elijah Allen and Richard Allen, to Samuel B. Sheldon, dated September 8th, 1796, recorded in the town clerk's office, in said Sheldon, May 23, 1804, conveying all the right of the said Philip, Elijah and Richard, and purporting to convey all the right of the other Allens in and to the town of Sheldon, aforesaid. The defendant then read in evidence the probate records, by which it appeared that said Sheldon died in September, 1807; that the said lots nos. 33, 38 and 57, were inventoried as a part of his estate; that his estate was represented insolvent; that one Dyer had allowed him against Sheldon's estate by commissioners duly appointed thereon, a certain sum; that *Levi Hapgood*, the plaintiff, James Herrick and John Haskins, were, on the 3rd day of June, 1811, duly appointed commissioners by the judge of probate, and sworn to set off lands of said Sheldon's estate to the creditors thereof, under a statute law of this state; that on the 20th day of June, 1811, said commissioners duly set off to said Dyer, in satisfaction of his claim, a part of lot no. 33, and made return of their doings to the court of probate, who accepted the same on the 22nd day of June, 1811. In 1813, Bradley Barlow, claiming lot no. 38, as having been set off to him in satisfaction of a debt due to him from said Sheldon's estate, informed Samuel Weed, of Sheldon, that he, Weed, might pasture on the "back lot," and allow him what was right. Said Weed accordingly examined said lot,

and found it to be uninclosed, the fences being down, and in some places no fence at all. And said Weed called on the plaintiff who claimed a part of said "back lot," as belonging to his brother, Hutchins Hapgood, to whom lot no. 57 was set off in June, 1811, in satisfaction of a debt due to said Hutchins Hapgood from said Sheldon's estate. The plaintiff at this time pointed out to Weed the corner between Barlow and Hutchins Hapgood. Weed and plaintiff then together fenced in the whole of said "back lot," and pastured there together about four years, for which Weed settled with Barlow. In 1821, Barlow gave one Stephen Brock leave to pasture on the "back lot." Brock called on the plaintiff, who said he owned land adjoining, and that a pasture might be enclosed to accommodate both ; and in 1822, Brock pastured on the "back lot," and land adjoining, for which he paid Barlow. It also appeared from the testimony, that said Sheldon was in possession of part of lots 33 and 57, and had been, for several years previous to his death, claiming the whole lots ; that persons in his employ, in 1806, made coal on the "back lot," and that in 1807, one Eldridge in the employment, or under the direction of said Sheldon, grew grain on a part of the "back lot;" that the plaintiff from 1811, up to the commencement of this suit, claimed lot no. 57, as the property of his brother, and said he expected to buy it of him. It was also admitted, that the representatives of said Sheldon continued to possess lot no. 33, except that part of it which was set off to Dyer, as aforesaid ; and that the defendant had a regular conveyance from Dyer of his right, under which the defendant entered upon the land in question, in 1825. The plaintiff then produced a deed, executed and recorded from the said Sheldon to him of lot no. 37, describing it by metes and bounds, and called on the defendant to show a division of the town by the original proprietors ; but no division was shown. The plaintiff under his deed entered into possession of lot no. 37, and so continued."

" The plaintiff insisted, 1. That having a deed from an original proprietor of lot no. 37, and being in possession of the land in question at the time the defendant entered and took possession of it, he was entitled to recover, unless the defendant showed a division, and a paramount right. 2. That the acts of the plaintiff in setting off to Dyer could not affect his right by possession. 3. That his permitting Weed and Brock to occupy with him, did not change the character of his possession. 4. That if in possession, whether claiming the land as Hutchins Hapgood's, or as his own, he was entitled to recover against all but the rightful owner."

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“The defendant insisted, 1. That the plaintiff was not in adverse possession from 1804 to the time the land was set off. 2. That if he was, his acting as a commissioner, without setting up his claim at the time, was an abandonment of his possession. 3. That it was not necessary to show a division of the town by the original proprietors, inasmuch as the plaintiff's deed from Sheldon restrained his right to a particular lot, which, it is not pretended, included the lands in question. 4. That the plaintiff having claimed to be in possession of lot no. 57, as the agent of Hutchins Hapgood, the possession of the plaintiff was Hutchins Hapgood's, and would not enable the plaintiff to sustain the action of ejectment.”

“From the facts aforesaid the referees decided, that the defendant was not guilty, and that he recover his costs.” They added, “in their decision the referees intended to be guided by the law of the land.”

This report was signed by the three referees, and returned into the county court in due season. To which report the plaintiff filed his exceptions: 1. Because the referees decided, that although the plaintiff was, at the commencement of his suit, and had been many years previously, in the actual possession and occupation of the land in question; yet, as the plaintiff was acting as agent of Hutchins Hapgood, he could not sustain the action in his own name. 2. They also decided, that the plaintiff was estopped from holding or claiming the land in question, because he with two others had been appointed a commissioner to set off lands from the estate of Samuel B. Sheldon to creditors of said estate, and did in pursuance of said appointment, set off the land in question, in 1811, to said creditors, from whom the defendant claims to have derived his title. The county court, notwithstanding these exceptions, accepted the report of the referees, and rendered judgement, that the defendant was not guilty, and that he recover his costs. To this judgement the plaintiff filed his exceptions, which were now to be considered.

*Hunt, Beardsley and Sheldon, for plaintiff.*

*Brown and Burt, for defendant,* contended, That the plaintiff had not shown a title by the statute of limitations: 1. Because it does not appear, that the plaintiff was in the actual possession of any part of lot no. 33 until after 1810, and then it was not exclusive, but a mixed possession.—(5 *Pick. Rep.* 131; 10 *Mass. Rep.* 157, 408.) 2. Because the possession was not

continued, the lands being common and uninclosed in 1813, when Weed and the plaintiff repaired the fences.—(2 *J. R.* 230.) 3. Because the possession was not attached with any claim of title to lot no. 33.—(1 *Mass. Rep.* 486 ; 2 *Aik. Rep.* 155.) 4. Because the plaintiff was in possession of lot no. 57, claiming title as agent of Hutchins Hapgood ; and though he might have occupied a corner of lot no. 33, yet his possession should be limited by his claim of title. 5. The only evidence of any claim of title by the plaintiff was his calling the whole, his back lot ; and this should be taken to relate to lot no. 57, where the plaintiff had a right to be in possession, and not to lot no 33. 6. Because the plaintiff took, and continued in, possession of the lands in question as the agent of Hutchins Hapgood. Finally, if the plaintiff had possession of lot no. 33, at the time he set off the land in question to Dyer, as the property of Sheldon, this would be a waiver of his possession. The plaintiff had no claim of title upon record of which Dyer could be presumed to have notice ; his claim, if any, rested in parol ; and to permit the plaintiff to avail himself of such claim without any proof, that he gave Dyer notice at the time he set off the land, would be to permit the plaintiff to profit by a gross fraud. The lands in question had been inventoried as belonging to Sheldon's estate. The plaintiff as commissioner on said estate appraised and set off the land as belonging to said estate to Dyer, in satisfaction of his debt. This is evidence that the plaintiff acknowledged the title of Sheldon as against himself. If the plaintiff was in possession of the land at the time, the presumption is, that he was not in possession. adversely to Sheldon or his representatives, but as their tenant.—(1 *Chip. Rep.* 48,49.)

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BAYLIES, J., delivered the opinion of the Court.—The correctness of the decision of the court below depends upon the facts, which were reported by the referees, and the law to be applied to those facts. It is not every possession of lands for fifteen years, that will give the tenant a title to such lands. Much depends on the character of the possession. To constitute a title, the possession should conform to the law, which is well expressed by *Parsons, Ch. J.*, in the case of "*The proprietors of the Kenebeck Purchase vs. John Springer*, (4 *Mass. Rep.* 416.) He says, "When a man enters on the land claiming a right or title to the same, and acquires a seizin by his entry, his seizin shall extend to the whole parcel, to which he had right ; for in this case an entry on part is an entry on the whole. When a man not claiming any right or



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title to the land shall enter on it, he acquires no seizin, but by the ouster of him who was seized, and he is himself a disseizor. To constitute an ouster of him who was seized, the disseizor must have the actual exclusive occupation of the land, claiming to hold it against him who was seized, or he must actually turn him out of possession. When a disseizor claims to be seized by his entry and occupation, his seizin cannot extend further than his actual exclusive occupation; for no further can the party disseized be considered as ousted: for the acts of the wrong doer must be construed strictly, when he claims a benefit from his own wrong."

"To constitute a disseizin of the owner of uncultivated lands, by the entry and occupation of a party not claiming title to the land, the occupation must be of that nature and notoriety, that the owner may be presumed to know that there is a possession of the land adverse to his title: otherwise, a man may be disseized without his knowledge, and the statute of limitations may run against him, while he has no ground to believe, that his seizin has been interrupted."

Fifteen years uninterrupted wrongful possession, with actual notorious occupation, claiming the land as his own, whether at first the entry of the tenant was with, or without colour of title, tolls the entry of the rightful owner, and, by our statute of limitations, is a bar to any possessory action which the owner can bring.

The report of the referees states, that the plaintiff and others in 1804, or 1805, cut timber, and made coal on the land in question. Probably this was a mere trespass upon the freehold; or it was done by the licence, or for the benefit of the owner of the land, and cannot be considered as the beginning of a title by possession. The report also says, "that from 1810, till the defendant entered upon, and took possession, of that part of the 'back lot' which is on lot no. 33, in 1825, the plaintiff occupied the 'back lot' as a pasture, called it his 'back lot,' and occasionally, during all that period of time, repaired the fences around it." But this does not show, that the plaintiff was in possession of the land in question, fifteen years before the defendant's entry. To determine the length of time, it is necessary to know the month in which the plaintiff made his fence, and the month in which the defendant entered. If the plaintiff made his fence in December, 1810, and the defendant entered in January, 1825, the plaintiff's possession fell short of fifteen years. It was for the plaintiff to have proved, that he possessed the land in question, adversely, for fifteen full years—and it should appear to be a continued, and un-

interrupted possession; not an occasional improving the land one year, and not occupying the next. It also appears, that the plaintiff claimed to hold lot no. 57 for his brother, Hutchins Hapgood, and occupied the back lot, so called, five years in common with the tenants of Bradley Barlow, who claimed lot no. 38. And there are several other facts disclosed, which have a bearing against the plaintiff's supposed title. From all the facts in the case, it was for the referees to decide, whether the plaintiff showed a legal title to the land in question, by adverse possession. If his possession was short of fifteen years, although it was prior to the defendant's entry, it could not avail the plaintiff, if the defendant was the rightful owner. It does not appear from the report, how the referees decided the several questions of law, which were raised by counsel in argument. But, in coming to their final decision, they say, they intended to be guided by the law of the land. This Court will not presume that they departed from this rule.

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The judgement of the county court  
is affirmed with additional costs.

EXECUTORS OF JOSEPH TUCKER vs. ABNER KEELER and  
CHARLES COOTWIRE.

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If a mortgagor remains in possession of the mortgaged premises after a decree of foreclosure and the expiration of the time for redemption, he is a tenant at sufferance to the mortgagee, or his assignee, and the statute of limitations will not run in his favor.

A defendant in ejectment, who does not derive his possession from the plaintiff, but claims adversely, may, at any time before trial, purchase in an outstanding title to protect his possession.

Ejectment for the second division lots drawn to Ebenezer Morse, Stephen Pearl, Joseph Fay and Stephen ———, in the town of South-Hero. Plea, not guilty, and issue joined to the country. On the trial of this case, it appeared in evidence that one Ebenezer Stark, without any title, took possession of that part of the land in question, which was in dispute, in the year, A. D. 1802; that in the year 1805, he mortgaged the same to one Carlisle D. Tylee for \$100. Tylee obtained a decree of foreclosure in January, 1807, and the equity of redemption expired in January, 1808. The 5th of May, 1807, Tylee executed a quit-claim deed of the premises to James Tobias, of Grand-Isle. Ebenezer Stark remained in possession for several years after; and during the late war, he left his family upon the land, and was

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there himself but very little afterwards. In 1813, Ebenezer Stark quit-claimed the land in question to Ralph Stark, his son, who had the principal care of his father's family until they moved off in, or about, the year 1823 ; and the same year (1823) the defendants took possession of the premises, which were immediately afterwards attached by the plaintiffs as the property of Ebenezer Stark, and, in 1825, set off on execution. It further appeared in evidence that Tobias died in the year 1811 ; and it did not appear that said lands were inventoried as his estate, nor that any claim had been made by Tobias, Tylee, or any other person, under the mortgage, from the time of the foreclosure, up to the 29th of March, 1830, when the heirs of Tobias deeded the same lands to *Abner Keeler*, one of the defendants. It also appeared that Stark, from 1802, to the time of his moving away, was very poor, and much embarrassed with debts. The defendants then offered to show the acknowledgements of Ebenezer Stark, previous to plaintiff's attachment in 1823, that he had never paid off the mortgage, but that the same remained due ; which showing was objected to by the plaintiffs ; but the court overruled the objection, and Ralph Stark was offered as a witness, but was objected to because, for the consideration of \$200, the said Ralph had quit-claimed the same land to the said *Keeler*, with warranty and seizin : whereupon *Keeler* executed to the said Ralph a writing discharging him from his said covenants ; and the witness was sworn, and testified, " that when his father executed to him a quit-claim deed of the lands in question, in the year 1813, he then told the witness, that the mortgage was not paid, and the witness must pay it, if the same was called for ;" and said that it was never called for, and the witness never paid it ; and after the close of the war, he heard his father say " that the mortgage had never been paid off, but remained due." Stephen Pearl, a witness, testified that he lived on the lot adjoining Stark, and that Stark always told him, that he had lost the land upon the mortgage, but intended to buy it back whenever he should have a chance : and in 1812 or 1813, Stark attempted to obtain a title to it, by bidding it off at vendue ; but it was redeemed before the time of redemption expired. The plaintiffs contended that the jury ought to presume that the mortgage was given to Tylee for the purpose of defrauding the creditors of Ebenezer Stark ; or if given for a valuable consideration, then, that the mortgage was paid off prior to the deed from the heirs of Tobias to *Keeler* ; that the said Ebenezer Stark, by remaining in possession fifteen years, by himself and family, after the expira-

tion of the equity of redemption, acquired a title to the land by the statute of limitations;—that inasmuch as the plaintiffs are creditors of Ebenezer Stark, it was not competent for the defendants to purchase in an out standing title, after the commencement of this suit, to defeat the plaintiff's title, and requested the court so to instruct the jury. But the court were of opinion that there was no evidence in the case tending to induce a belief that the giving of the mortgage was in any wise fraudulent; that the jury were at liberty to presume, if they thought the facts would justify it, the mortgage money was paid off prior to the expiration of the equity of redemption; but if not paid, then Tobias acquired an indseasable estate in fee simple as against Ebenezer Stark, and all claiming under him; and if Ebenezer Stark afterwards paid Tobias the amount of the decree, and interest, he must have taken a reconveyance of the estate by deed, in order to be reinvested with it; and to suppose the contrary, might operate as a fraud upon a third person, as it did upon Keeler; that if the condition of the mortgage was broken, Ebenezer Stark, by continuing upon the land, stood in the light of tenant at sufferance to the mortgagee, or his assignee, and the statute of limitations would not run in his favor. And, in relation to Keeler not having a right to purchase in the true title after an action of ejectment was brought against him, it is observable, that the plaintiffs did not put the defendants in possession; therefore, they had a right to show the title out of the plaintiffs: and it was as competent for the defendants to show that Stark had no interest in the land at the time of the attachment, as it would be to show a defect in the attachment by which it would not hold; and if the plaintiffs acquired no title by their levy by means of Ebenezer Stark having previously parted with his title, then Keeler had a right to purchase of the heirs of Tobias; for, it did the plaintiffs no harm.. Keeler might have shown the title in the heirs of Tobias, and thereby defeat the plaintiffs' action—and the court so instructed the jury. To which decision and charge of the court the plaintiffs excepted, and the case was ordered to be passed to the Supreme Court.

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BAYLIES, J., delivered the opinion of the Court.—The act, (*Slade's Ed. ch. 18, s. 2.*) entitled "An act to prevent fraudulent speculations, and the sale of choses in action," in its *proviso*, says, this act is not to be construed in any way to affect any lease, deed, or other conveyance to the person in possession claiming

## CASES IN THE SUPREME COURT

**GRAND-ISLE,** adversely to the lessor, or grantor. And the rule is, that a defendant in ejectment, who did not derive his possession from the plaintiff; but claims adversely, may, at any time before trial, purchase in an outstanding title to protect his possession.—(8 *John. Rep.* 139. I see no error in the proceedings of the county court; therefore, their

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Judgement is affirmed with additional costs.

*Turner & Brown,* for plaintiffs.

*Allen, Smalley & Adams,* for defendants.



## HENRY LADD vs. HARRY HILL

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The county court ought not to dismiss an action for want of jurisdiction, where there are several counts in the declaration, and the damages are uncertain; though such court may be of opinion that the plaintiff ought to recover less than one hundred dollars.

In such a case, the motion is addressed to the sound discretion of the court, and ought not to prevail, unless the court are satisfied, that all which is sought in the declaration, might be so presented, that the merits could surely be tried in one action before a justice of the peace.

The jurisdiction of the county court cannot be affected by testimony of the defendant, calculated to lower the damages.

If a chattel is owned by two as tenants in common, and a creditor of one attaches such chattel, he must attach only the undivided half belonging to his debtor.

This was an action of *trover*, in two counts. The first was for five oxen and one ox-yoke, describing them by their color &c., and alleging them to be of the price of one hundred and twenty dollars. The second count was for a note signed by the defendant, and made payable to one Eli Denio, in neat cattle, at a place named, on the 15th day of October, 1829. The action was tried upon the general issue, and the plaintiff obtained a verdict for about thirty dollars, being a less sum than he contended for. The action was brought up to this Court by a bill of exceptions, taken to several decisions of the county court on said trial. The bill of exceptions showed, that there was evidence tending to prove the following facts: That the plaintiff had received the note in question as security for thirty dollars, and was accountable for the balance to said Eli Denio, if he received the pay on the same; that, on the day when the note became payable, the plaintiff procured some person to make a cast of interest and indorsements, and ascertain what sum was then due; that the person did so, and found \$56 due, and minuted the same in figures on the note; that the plaintiff went with the note to the place of payment, where notice was given,

that the plaintiff owned a part of the note; and the defendant's agent turned out a yoke of oxen, that were appraised in payment of said note, by appraisers mutually agreed upon by said agent and the plaintiff. The note was given up to said agent. And before the plaintiff had moved the cattle, the same were attached by virtue of a writ in favor of this defendant, against John Denio, to whom it seems, Eli, the payee, had conveyed all of said note, except what was owned by the plaintiff. The note was delivered back to the plaintiff, for him to seek his remedy where he could. Shortly after the defendant obtained the note to look at, and then forcibly kept it. The defendant's testimony tended to show, that the plaintiff's interest in the note amounted only to thirty dollars. When the plaintiff's testimony was through, and again when the defendant's testimony was through, the defendant moved the court to dismiss the action for want of jurisdiction. This was refused. The cattle were sold upon defendant's execution, against said John Denio.

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*Smalley and Adams, for the defendant.*—The first question in this case is, had the county court jurisdiction? This question involves the enquiry, what is the criterion for determining the amount of the plaintiff's "*debt or matter in demand*," the allegations in his declaration or the proofs which he adduces to establish them? If the declaration is to be considered as furnishing the criterion, without reference to the evidence, that ends the enquiry in this case: and in all cases the plaintiff has only to elect his jurisdiction at the time of framing his declaration, and he can resort to whatever tribunal he pleases. If the plaintiff's *clamor*, and not his *proof*, is his "*debt or matter in demand*," he has it in his power to confound and abrogate all bounds and limitations of jurisdiction, and render all legislation on the subject ineffectual and absurd. The legislative power is reduced to a mere faculty of creating a diversity of courts from which the suitor may select his favorite. This has not been the rule in this court, or in any other court. The plaintiff's "*debt or matter in demand*," is what he has a *right* to demand; and his right depends on his evidence. Hence the true rule is, that the declaration and proof must *prima facie* concur in giving jurisdiction, or the court is bound to dismiss the action. Thus, if the declaration does not set forth a cause of action within the jurisdiction of the court, the defendant is not bound to notice it, and the court cannot act upon it. So if the declaration disclose a cause of action within the jurisdiction of the

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court, and the plaintiff's showing, *uncontradicted*, present a case of which the court cannot by law take cognisance, they will no longer entertain the suit, but, will dismiss it on motion. This doctrine is a necessary part of our judiciary system, consisting, as it does, of a number of separate restricted jurisdictions,—and has repeatedly been recognised and acted upon in this Court. It is built upon the assumption that the “*matter in demand*” is not what the party claims in his declaration or plea, but what his proof entitles him to recover. *Southwick et al. vs. Merrill*, 3 *Vt. Rep.* 32 ; *Brush vs. Hurlburt*, 3 *do.* 46 ; 1 *Swift's Dig.* 606 ; 1 *Wils.* 23, 335 ; *Ld. Raym.* 767.

But it is objected that the rule which has been adopted in reference to actions *ex contractu* cannot be applied to actions *ex delicto*. This objection might avail in those actions of *tort*, where the facts being established, the law has not fixed the rule of damage, but has left it to the discretion of the jury to give what damages they think fit. But the justice or jurisdiction of courts is not to be confounded in a net of forms. The action of trover is in form a fiction ; in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use. Consequently, the rule of damages in this action is the value of the goods at the time of the conversion ; and is no more a matter of discretion or uncertainty than in the action for goods sold and delivered. The plaintiff's evidence left nothing to the discretion of the jury in respect of damages.—*Kennedy vs. Whitewell*, 4 *Pick. Rep.* 466. Questions of this kind have been the subject of frequent discussion in the Supreme Court of the United States : and the rule is well established there, that the amount of the “*matter in dispute*” is not to be settled by the declaration, but by the evidence on trial.—*Peyton vs. Robertson*, 9 *Wheat.* 527 ; *Wilson vs. Daniel*, 1 *Cond. Rep.* 185.

2. As to the oxen:—Supposing the defendant had a right to attach the oxen and take them into custody—which was conceded on trial—then, at what stage in the proceedings did his acts become unlawful ? What circumstances give them an illegal character ? The taking being legal, how is the retention converted into a wrong ? since the plaintiff's interest has not been prejudiced by it, or withheld from him. If the law gives the defendant the right to *take* but not to *sell*, then, indeed, he must be contented with this barren right.—*Reed et al. vs. Shepardson*, 2 *Vt. Rep.* 120. By the sale on the execution the defendant became possessed of Denio's interest, and consequently tenant in common with the



plaintiff: and it is settled, that one tenant in common cannot maintain trover against his companion; for the possession of one is the possession of both.—2 *Will. Saund.* 47. But it is said that the sale of the oxen as Denio's property was a conversion. It is not necessary to contend, that this sale would not even be evidence to the jury under the circumstances of the case from which a conversion might be inferred: for the charge of the court took the consideration of this fact as evidence from the jury entirely, and instructed them that in law it was a conversion. This was erroneous. Conversion is a presumption of law and fact, and cannot be adjudged by the court, but must be found by the jury from the evidence. A demand and refusal is but evidence of conversion; and, therefore, in a special verdict, if the jury merely find a demand and refusal, the court cannot award judgement on the verdict. When the defendant comes lawfully into possession of the goods, this proof is always necessary.—2 *Will. Saund.* 47, in note; 3 *Starkie*, 1497. It is settled that nothing short of the actual destruction—by the tenant—of the chattel held in common, will subject him to an action of *trover* from his companion. Now it is idle to maintain that a yoke of oxen are *destroyed* by a sale, or whilst they remain in the defendant's pasture. The sale on the execution merely vested in the purchaser Denio's interest. It had no effect upon the plaintiff, and cannot *ipso facto* be deemed a disturbance of his rights.—*Heath vs. Hubbard*, 4 *East*, 110-28; *Buller's N. P.* 34-35; *Martyn vs. Knowllys*, 8 *T. R.* 145; *Holliday vs. Cammel et al.* 1 *T.* 658; 1 *Coke on Litt.* 785-6, 907-8-9. A purchaser under sheriff's sale of the goods of B, on execution against A, requires no title against B. *Farrant vs. Thompson*, 7 *C. L. R.* 272. *Storm vs. Livingston*, 6 *John.* 43; *St. John vs. Standing*, 2 *Johns.* 468; *Wilson et al. vs. ———*, 3 *Johns.* 174.

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*Harrington, for the plaintiff.*—The plaintiff contends, that, though property owned jointly may be attached in a suit against one of the joint owners, yet the creditor can only take the interest which his debtor has in the property. Though a creditor, when he attaches the interest of one of the joint owners, may be entitled to the possession of the whole property to secure himself against subsequent attachments of other creditors of the same joint owner, yet if he attaches and disposes of the whole property, it would be a conversion for which an action of trover would lie by the other joint owner for his share of the property. If the

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turning out of the property in this case amounted to a payment of the note, it vested in the plaintiff and John Denio, each owning jointly in the oxen the same amount that they owned in the note before the payment ; and as the defendant took and disposed of the whole, it was a conversion of the plaintiff's share, for which this action will lie. But the note was not paid. The defendant should be bound by his acts and declarations at the time. He declared that he turned out the property to Denio, and immediately attached it as his. By this the defendant deprived the plaintiff of the property, and placed the whole to the credit of Denio. The defendant might have paid the note to the plaintiff who was the holder—have taken up his obligation and then attached Denio's share : -but he did not do so. He elected to pay the whole to Denio, trusting to his right to receive it, and he must be bound by that election. The act of the defendant in thus attempting to discharge his obligation, without benefit to the plaintiff, was as much a fraud upon the holder, as payment to Denio would have been after notice of transfer, and could not extinguish the plaintiff's right in the note, or bar his right to recover upon it. Had the defendant turned out the property generally at the time and place specified in the note, he would, without doubt, have discharged the obligation, though Denio had taken possession of the property. But the defendant chose to decide the right to receive payment, and cannot now be permitted to alter his decision. But the turning out of the property, if it did discharge the obligation as to the defendant, did not extinguish the plaintiff's interest in the note. The defendant had paid, as we contend, to Denio, and the plaintiff had a right to go back upon the person of whom he purchased. The note was a necessary part of the evidence of that claim ; and the plaintiff had a right to retain the note, and can recover for its conversion by the defendant.

On the question of jurisdiction, we contend, That the jurisdiction is to be determined by the writ and declaration :—if these give jurisdiction to the court, it cannot be taken away by any subsequent event. This principle holds good as well with regard to the parties, as to the subject matter. When the court have once jurisdiction of the parties, no subsequent act can oust the court of their jurisdiction ; and it is the same as to the subject matter of the suit. The jurisdiction of the court cannot be determined by the evidence given in the case. If it is to depend upon the evidence, then, if the plaintiff should declare in *trover* for property alleged to be worth \$100, 00, yet if his witnesses should set

it within that sum, the court would have no jurisdiction. If he should value his property less than \$100, and the witnesses should set it over that sum, this would oust the justice of his jurisdiction. So that the jurisdiction of the court would not depend upon any settled and known rule of law, but upon the opinion of witnesses. The property declared for in the first count is of sufficient value to give the county court jurisdiction, and that is not lost because the plaintiff has not succeeded in recovering the whole. If the plaintiff's failing to establish a part of his claim would deprive the court of their jurisdiction, much more would they be deprived of it, had he failed to establish any part; and every trial upon the merits would be but a question of jurisdiction. If the plaintiff succeeded, the adjudication of the court would be conclusive: if he failed, the court would be ousted of their jurisdiction, and the whole proceedings would be void.—3 *Conn. Rep.* 553, *Newtown vs. Danbury*. The second count in the plaintiff's declaration may well be taken as an example to illustrate the doctrine. That sets out the conversion of a note for principal and interest amounting to \$112, 00. Now if the court should be of opinion, that the plaintiff can recover on that count, they have jurisdiction of the cause: if they should decide against the plaintiff, then they have no jurisdiction, and this to a question not arising upon the state of the pleadings, but growing out of evidence given to the jury on a trial of the merits. The conclusion is, that the court have jurisdiction to hear, try and determine the merits; but have no jurisdiction of the cause. The very presumption that they can determine the legality of the plaintiff's claim, presumes that they have jurisdiction.—2. *T. Rep.* 643, *Owen vs. Hurd*; 1 *D. Chip.* 208, *Gale vs. Bonyea*. Should it be contended that the interest of the plaintiff in the note is less than \$100,00, it is answered that the note is a thing entire and undivisible, and if the plaintiff had possession coupled with an interest, and the defendant has converted it, the plaintiff can go for the whole note. This is one of the questions put in issue by the plea of the defendant; and this Court are now called upon to decide the law arising upon the evidence in the case: and the right of the court to decide finally the question must depend wholly upon their jurisdiction of the cause. Suppose the declaration had been for the note alone, and the evidence had been what it is in this case, and the county court had made the same charge they have now done, could not the plaintiff have excepted to that charge, and called upon this Court to determine his right to recover, and the extent of that right? And would

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this Court, after they had finally decided the cause, have ousted themselves of their jurisdiction, and have sent the plaintiff to a justice of the peace to have it sealed over again? And if the county court had jurisdiction of either count, they had jurisdiction of the whole, though the recovery should be on a count, of which, if standing alone, the court would not have had jurisdiction.—*McFarland vs. McLaughlin*, 2 D. Chip. Rep. 90; *Keyes vs. Weed*, 1 D. Chip. Rep. 379. Should it be said there was an indorsement on the note that reduced it, it is answered that the question to be tried is an indorsement of a note above the sum of \$100.—The indorsement is only evidence of payment; and whether this evidence is upon the note, or comes out from the testimony of witnesses, does not alter the case. In an action on the note itself, the statute has made the jurisdiction to depend on the indorsements; but this statute cannot be extended to an action of tort. In the suit on the note, the law presumes the evidence of payment in the possession of the plaintiff. In this action the note with the indorsements is in the hands of the defendant.

HUTCHINSON, C. J., pronounced the opinion of the Court.—The defendant's motion to dismiss for want of jurisdiction was not such a motion as should be granted of course: for sufficient was stated in the declaration to give the county court jurisdiction. The note of one hundred dollars, in one count, and four or five oxen in another, alleged to be worth \$120, *prima facie*, exceeded the jurisdiction of a justice of the peace. The motion was predicated upon a supposed failure of the plaintiff to prove so large a sum due to him, as would bring his case within the jurisdiction of the county court. The county court were called upon to weigh the plaintiff's testimony for the purpose of deciding this motion. And they ought not to dismiss the action, unless it was a clear case, that the plaintiff's whole claims, in this action, could be tried before a justice of the peace in one action. The plaintiff ought not to be dismissed from one court, and sent to another, where the jurisdiction would still be uncertain. The defendant's motion was addressed to the sound discretion of the court; and several circumstances were worthy of their attention. The matters stated in the declaration were large enough to give the county court jurisdiction. If it were suggested, that the plaintiff ought either to have sued for the note, treating it as unpaid, or for the \$56 worth of oxen, treating the note as paid, and either would have been within the jurisdiction of a justice of the peace, the question immediately arises, whether

he would have been safe to have sued in either of those ways, alone. Much might be urged to show that the note was paid, and was of no value when converted by the defendant, and that the plaintiff's only claim was for the oxen.

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Again, it might be urged, that the plaintiff's taking back the note, after the oxen were attached, was a refusal to treat the oxen as payment, and a determination to hold the note in full force. From the testimony stated in the case, I should consider the note paid, and the oxen the property of the plaintiff. But different testimony as to what transpired, when the oxen were turned out, and with regard to the powers of the person who then acted as agent for the defendant, might vary the case in this respect. This uncertainty, upon which count the plaintiff ought to recover, added to the uncertainty of what amount the plaintiff ought to recover, in reference to his own interest, and his liability over for whatever else was due upon the note, which still remained in defendant's possession, rendered it proper that the county court should retain jurisdiction. And here it may be observed, that the testimony on the part of the defendant could no more affect this question of jurisdiction, than proof of partial payments in any case whatever. The defendant's showing that the balance of the note, or of the cattle, after the plaintiff's debt was satisfied, belonged to John Denio, and was legally holden by the defendant's attachment against John, might go to reduce the damages, but could not deprive the court of jurisdiction.

Another question was raised upon the instructions given to the jury with regard to the conversion. If the note were the object of the recovery, there could be no doubt but that the defendant's obtaining it for examination, and then stuffing it into his mouth, and forcibly keeping it, was a conversion. I thought upon the hearing, that the same question was equally clear, if the oxen were the object of recovery. The plaintiff and John Denio, it now seems, owned them as tenants in common, and the defendant attached the whole as the property of John Denio. That, and the after sale, were clearly a conversion of the plaintiff's portion of the oxen. The defendant could of right take no more than the undivided portion which belonged to John Denio. If Eli and John Denio had been partners, or if John had had the sole possession of the oxen, and the plaintiff's interest in them had not been known to the defendant, and the defendant claimed by a purchase from John, a different question would have arisen.

The judgement of the county court is affirmed.

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**JABEZ ROGERS vs. JOSEPH HOUGH.**

The defendant, in a suit upon a note, may show the note to have been given without consideration.

The right of raising money by a lottery, once granted, but now of no legal force, is not a good consideration for a note.

Where a lottery-act requires three managers, one alone cannot act legally, but his proceedings are void.

If the plaintiff would urge, that the note on which the suit was brought was given to compromise a litigated claim, he must show it to have been so understood at the time of its execution.

This action draws in question the same lottery, brought to view in the suit, *Mills May & Co. vs. Chauncey Brownell*. (see 3 *Vt. Rep.* 463.) That was a suit to recover the value of the tickets sold. This is to recover the amount of a note, given for the right of raising money by this lottery. The present plaintiff was the grantee of the lottery. The grant was made in 1792, and was to enable him to raise money to remunerate his loss of a brewery by fire. The statute, in making the grant, appointed three managers, and required that each should be under bonds to the treasurer of the state for the faithful discharge of his trust. It also provided, that *Rogers* should give a bond with sureties in two thousand pounds to said treasurer, conditioned, that the money raised should be expended in a brewery, somewhere in this state. In the year 1798, the managers appointed in the grant having died, or refused to act, another statute passed authorizing the judges of the county court, for said Addison county, to appoint managers in the room and stead of those before appointed, and not acting. After the drawing of one or two classes, the whole lay dormant nearly thirty years, when Anthony Rhodes, claiming to be a manager, was induced by the plaintiff, and perhaps the defendant, to appoint *Hough*, the defendant, an agent to manage the concern, and set the lottery in motion. Before this, application was made to the judges of the county court to supply the vacancies in the managers, and they refused so to do. The plaintiff made a conveyance to *Hough* of the full right to manage, and raise money in this lottery for his own use and benefit. And *Hough* gave the plaintiff therefor his bond securing to the plaintiff \$4,000, to be paid after the drawing of certain classes in said lottery, and all within a given time. Some payment was made, and a note, the one on which this action was brought, was given for the balance. The issue was joined to the court, and they decided for the defendant, and the action came to this Court by a bill of exceptions, in which the foregoing facts were stated.

*O. Seymour, for the plaintiff.*—The plaintiff contends, that the acts of the legislature, referred to in the case, vested in him a right to raise the sum of £1200 by lottery, which right must continue to exist, until the object of the grant has been accomplished, or, until the right shall be determined by the death of the plaintiff, or by legislative enactment or judicial decision; and that the conveyance by him to the defendant of the right to conduct said lottery and to enjoy the benefit of it, was a legal and sufficient consideration for the bond referred to. There was something advantageous to the obligor and disadvantageous to the obligee. But, whatever might have been the case at the execution of the bond, after the defendant had sold tickets in the lottery to a large amount, drawn one or more classes, and realized the benefit of the plaintiff's grant, and the parties had come to a settlement, the defendant had given the note in question, and the plaintiff discharged the bond, it is too late for the defendant to rely upon the want of consideration. The note was given with a full knowledge of all the facts; and defendant having given the note in the nature of a compromise, he must be concluded by it.—2 *Com. Dig.* 334.

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*Linsley and Chipman, contra.*—The question is, whether the proceedings in the lottery in question were legal and valid. The case of *Mills May & Co.* it is understood was argued and decided on this ground. That was an action on book, for the price of tickets sold in the lottery in question; and the Court decided, that there could be no recovery, the drawing of the lottery being unauthorized by law, and the contract being, therefore, without consideration. This case cannot be distinguished from that. If *Hough*, or his agent, could not recover for the sale of the tickets, for want of consideration, surely *Rogers* cannot recover for the right to issue the tickets. *Rogers* undertook to sell to *Hough* the right to draw the lottery in question. If *Rogers* had not the right, *Hough* obtained nothing, and *Rogers* lost nothing; and any promise made thereto would be void. The giving the note did not vary the case, as there can be no pretence that it was in the nature of a compromise. The case shows that it was a mere exchange of one security for another.—*College vs. Williamson*, 1 *Vt. Rep.* 212. But the proceedings, in the lottery in question, were not only void, but illegal, and subjected both *Rogers* and *Hough* to penalties; and the parties are in *pari delicto*, and neither can recover of the other for any thing growing out of the illegal



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transaction.—*Munt et al. vs. Stokes*, 4 T. Rep. 561 ; *Maybin vs. Coulin*, 4 Dal. Rep. 298.

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HUTCHINSON, C. J.—The question now presented is, whether the county court rightly adjudged, that the consideration of the note in dispute, as proved, was not a good and legal consideration. It appears, that the plaintiff held the defendant's bond in the penal sum of \$8,000, with a condition thereto annexed, which recited a detailed contract about the sale, from the plaintiff to the defendant, of the plaintiff's right to raise money by his lottery ; for which defendant was to pay the plaintiff \$4000, at two payments, all in less than a year. One thousand dollars was paid and indorsed on this bond. What other payments were made does not appear in the case : but it appears that this note was given for the balance, and was executed two or three years after the \$4,000 had become payable. The case settles the fact, that this note had no other consideration, than the sale from the plaintiff to the defendant of his lottery, or right of raising money by said lottery. It was suggested in argument, that this note should be treated as given to compromise a litigated claim. But no fact in the case warrants that position. Nothing appears but that the defendant gave this note without suspecting that he had any defence to the bond. This may also be said of two payments, indorsed upon this same note, a month or two after its date.

What, then, was the right of the plaintiff under his lottery grant, which he sold to the defendant, and what was its value at the time of such sale ? It had lain dormant about thirty years. The proof that Rhodes was ever appointed a manager, is very faint. We discover nothing but his giving a bond to the treasurer, as such manager, in the form the law requires. We discover nothing in the case tending to show, that any others ever were appointed, after the additional statute of 1798. A late application for such appointment was refused by the judges. The grant expressly requires three managers to act. The law is well settled, that, in such a case, there must be three to act, and those agree in what they do, or it will be of no avail. Under the act of 1798, the judges could only make appointments to fill the vacancies then existing. But it does not appear, that those were ever filled, unless the appointment of Rhodes filled one of them. During the long sleep of this grant, we may well suppose, that all who had signed bonds for managers, or for any other purpose, have died,

or changed their residence, or become irresponsible. Indeed, it is said, that Rhodes, the only manager living, lives out of the United States. The giving a bond to the treasurer in £2,000, as security, that the money raised by this lottery should be expended in a brewery within this state, was a condition precedent to any right to raise money by this lottery. It does not appear that such bond was ever given. If such were given soon after the grant, its available force at this day is not to be presumed. Nor is there any pretence that *Hough* was to expend this money, if he obtained any, in any thing connected with a brewery. While this grant has lain dormant, the whole face of society has changed. Wealth has become more uniformly the result of enterprise. The hand of charity has become potent for the relief of the distressed. The necessity, then supposed to exist, to encourage breweries, has long since ceased. The grant has not been revived. It ought not to be revived. It had ceased to be any authority for issuing and vending lottery tickets. Other statutes enact severe penalties for selling lottery tickets, not authorized by some law of this state. What, then, we again ask, was the right which the plaintiff sold to the defendant, for a part of which sale this note was given? It was the right of attempting to speculate in a void lottery, and forfeit a penalty for every ticket sold, and, probably, become liable to pay back to purchasers all the money they paid for tickets. Its value, then, at the time of the sale, was nothing. It could not form a good and legal consideration for this note, nor for any contract whatever.

But it is said the defendant made this purchase knowingly. The plaintiff, being the grantee, is bound to know, if he had never complied with the conditions of the grant, or if there was any failure in the legal number of managers. Probably the defendant knew all about the business. Be it so, that does not injure his defence. In such case, the law will not aid either to recover of the other. The plaintiff cannot recover his note: nor can the defendant recover back the money he paid.

The judgement of the county court is affirmed.

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GEORGE CLEVELAND *vs.* REUBEN ALLEN.

An officer's return of the levy of an execution on real estate is valid, if it is made according to the form given in the late *Judge Chipman's Reports*.

But, if the return departs from the generality of expression, there used, and begins with more minute particulars, it must contain all the particulars made necessary by statute.

A defective description of some lots in the levy, does not vitiate the levy with regard to such lots as are fully described; although the appraisal is only mentioned in the gross sum, at which all the lots are appraised, unless the question is raised upon some motion to set aside the levy, and leave the execution unsatisfied.

This was an action of *ejectment* for lands in Salisbury, in the county of Addison. It was tried by jury in the county court, and brought up to this Court upon exceptions to decisions of the court upon the trial. The plaintiff made a good *prima facie* title to the premises by the levy of an execution upon the same, as the property of the Glass Factory Company. The papers showing this levy appeared regular, and were read to the jury without objection. The defendant then set up in his defence a prior levy of an execution upon the same property, as belonging to the same Glass Factory Company. To this levy several objections were raised. One was, that many lots of land were contained in the levy, yet the value of each lot was not named, but only the gross sum at which all the lots were appraised; and yet many of the lots were so defectively described, that there could be no pretence of holding them under the levy. Another objection was, that the officer made no demand of the debt before levy: nor did he call upon the debtor and give him notice to appoint appraisers. Also, that a justice of the peace appointed six appraisers, instead of three. This appeared by the certificate of the justice. He appointed three in each of the two towns, in which two separate levies were to be made. These exceptions were now argued before this Court.

*Doolittle and Bates, for the plaintiff, cited Payne vs. Webster et al.* 1 *Vt. Rep.* 101; *Metcalf vs. Gillet*, 5 *Conn. Rep.* 403; *Eels vs. Day*, 4 *do.* 95; *Bott vs. Burnell*, 11 *Mass. Rep.* 165; *Dutton vs. Tracy*, 4 *Conn. Rep.* 365; *Stanton vs. Banister*, 2 *Vt. Rep.* 464.

*Seymour, for the defendant, cited N. Chip. Rep.* 264-5; *Hathaway vs. Phelps*, 2 *Aik. Rep.* 84; 1 *Vt. Rep.* 101, 336.

*The opinion of the Court was pronounced by,*

HUTCHINSON, C. J.—All the questions, agitated in this cause, regard the levy under which the defendant claims : for the plaintiff's title is admitted to be good, unless removed by this prior levy, set up by the defendant. To this the plaintiff objects, that the appraisers were appointed by a justice of the peace, and his certificate shows that he appointed six instead of three. If the officer's return let this certificate of the justice remain an essential part of the proceedings, to make his return entire, it would form an objection of weight ; because, while three only can appraise, it would be uncertain which three of the six were appointed to appraise the property taken on the execution. But the fact turns out to be, that the officer was making two levies, one on lands in Salisbury, and the other on lands in Leicester, a town adjoining ; and three of these men, appointed by the justice, lived in Salisbury, and the other three in Leicester. And this certificate of the justice need not accompany the return at all, provided the return itself contains sufficient allegations, to show who are the appraisers, and that they were properly appointed ; and the officer's return, in this case, contains all the officer would have said, had there been no certificate of the appointment signed by the justice. The officer has named the three persons, who appraised this estate, and says they were chosen, appointed and sworn, as the law directs ; using the words of the form published by *Judge Chipman*. The levies made according to this form have been established by repeated judicial decisions. That form emanated from so high authority, and such extensive real estates were holden under it, before there was any suspicion of its possible incorrectness, and these estates generally taken instead of money, rather through a necessity imposed upon the several creditors, courts have uniformly felt constrained to support such levies as adopted this form.

This form has been followed in the present case, so far as to cure this objection with regard to the appointment of appraisers, or showing how the same were appointed ; as also with regard to the semblance of defect in stating a demand upon the debtor of payment of the execution before the levy. If the officer adopts the generality of expression, prescribed in this form, it is good ; for it comprehends every thing that is deemed essential, in general terms ; but it wants that particularity which would be required in a new case arising without any such foundation in forms or in practice. But when an officer begins with particularities, he

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must take care to put into his return enough of them to render his levy a compliance with the statute.

Another objection is raised to the want of a sufficient description of the estate levied upon, and a showing the sum at which each lot was appraised. It appears, that the lot in question was well described; and many lots seem to have no description by which they could ever be found. And the appraisal is only mentioned once, and that as being the whole amount of all the lots. This objection would have great weight, if it were raised in any form, by either party to the levy, so as to set aside the levy and leave the executions unsatisfied. But, while the creditor holds on upon his levy, and is willing to hold what is well described, and lose the remainder, it would seem unjust to admit the debtor, or any one claiming under him, to avoid the levy wholly, because some of the lots are not well described. The debtor has no rights that can be injuriously affected by this naming the sum in gross. He might wish to profit by redeeming some lots, that might be appraised low, and let the others go unredeemed: but this can never be admitted. He must redeem the whole or none, and can suffer no injury from the want of knowing the appraisal of each lot. The case of *Payne vs. Webster et al.* cited by the defendant's counsel, is in point. That was a similar case, in this respect, and the point was expressly raised, and fully decided.

The judgement of the county court is affirmed.



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### ROBERT B. BATES vs. SOLOMON DOWNER.

The county court should dismiss a suit for want of jurisdiction, where the sum declared for, as a balance on book, and the *ad damnum*, are each one hundred dollars, and no more.

The plaintiff's writ must show, that the court, to which he applies, has jurisdiction of his action: at least, the contrary must not appear.

The plaintiff's testimony must also show his case within the jurisdiction of the court, to which he brings his action.

This was an action on *book account*, and a motion in writing was filed in the county court to dismiss the suit on the ground that the court had no jurisdiction. Evidence that the debit side of the plaintiff's book exceeded one hundred dollars was offered, and rejected. And the question was, whether it was necessary, to sustain the jurisdiction of the court, that the sum demanded in the writ should exceed one hundred dollars. The court decided it was necessary; and, therefore, rendered judgement that the suit

be dismissed. To which the plaintiff, in the usual form excepted, and the case was reserved for the opinion of this Court.

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*Plaintiff, pro se.*—The question in this case is, whether an *action on book* in the county court must be dismissed for want of jurisdiction, provided the *ad damnum* does not exceed one hundred dollars? I contend the court has jurisdiction, when the debtor side of the book exceeds one hundred dollars, though a less sum is due, and demanded by the plaintiff. Formerly, by a statutory provision, a justice of peace, and not the county court, had jurisdiction, unless the *balance due* exceeded one hundred dollars, whatever might be the amount on either side of the book. While this law was in force, a plaintiff, demanding in the county court less than one hundred dollars, shewed conclusively that the court had no jurisdiction; because they then had jurisdiction in that class of cases only, in which the sum due exceeded that amount. But when by the late statute jurisdiction was given to the county court whenever the debtor side of the plaintiff's book exceeded one hundred dollars, however small might be the sum due, a writ, demanding less than that, would not of course shew a want of jurisdiction; because, in a numerous class of cases properly brought to that court, the balance due would be less than one hundred dollars. When the statute placed the jurisdiction upon the debtor side of the book, and not upon the *balance due*, the *balance* demanded ceased of course to be the criterion of jurisdiction: and the court would not dismiss a suit before it appeared by the production of the book, whether it ought to be sustained or not. In such case, why should a larger sum than is due be demanded? There is no provision to that effect in the statute book. Such allegation cannot be proved, nor is it necessary, that there should *in fact* be so much due to give the court a jurisdiction. In some cases, to attach property, or hold the defendant to bail for more than one hundred dollars, when a much less sum was due, might be injurious and oppressive. And, indeed, it would be an absurdity in any code of laws to compel a man, bringing a suit, to make a false allegation, as to the sum due to him, and to demand a larger sum than he wishes to recover. The sum demanded was never conclusive of jurisdiction, independent of the book, under the old statute. When more than one hundred dollars was demanded, in the action on book, if, from the plaintiff's showing on the trial, a less sum was due, the suit would be dismissed.

It is said to have been decided, that, to deprive a defendant of

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his right to an appeal from a justice, when the sum in controversy is under ten dollars, it is necessary that the plaintiff should demand less, and that his book also should show less due. That was perhaps correct ; for, having demanded, and holden the defendant to bail for, more than ten dollars, he ought to be estopped from asserting, that a sum to that amount was not in controversy. And, if his book showed that more than ten dollars was actually due, or in controversy, to demand, in his writ, a less sum, would be an attempt to apply the statute to a case, to which it was not intended to apply, and defraud the defendant of his right of appeal. Whereas, in cases like the present, the actual sum due is demanded, and the production of the book shows, that the suit is brought in the proper court. That authority is, therefore, rather in favour, than against the present action. It is unnecessary to remark, that our courts have always given a very liberal construction to statutes in favour of an appeal ; as the case of *Shumway vs. Shumway*, (2 *Vt. Rep.* 339,) very clearly proves. While, on the contrary, it has been a long settled rule, with courts of general jurisdiction, to favour, rather than repel, cases involving some doubt as to jurisdiction ; because it is only dismissing, and turning round, parties to begin again.

*Woodbridge, for defendant.*—The defendant contends, that the decision of the county court was correct, on the following grounds :—1. By an act of the legislature of this state, passed November 15, 1821, it is enacted, That every justice of the peace, within his proper sphere of jurisdiction, be, and hereby is, authorized and empowered to hear, try and determine, all pleas and actions of a civil nature, other than actions for slanderous words, false imprisonment, replevin above the sum of seven dollars, trespass on the freehold, and where the title of land is concerned, when the debt or other matter in demand does not exceed one hundred dollars.—*Rev. Stat. Slade's ed.* p. 139. 2. By an act passed November 5, 1801, it is enacted, That the several county courts shall not hear, determine or adjudge, on any action or suit, which is originally made cognisable before a justice of the peace, unless such action or suit shall be entered in such court by appeal.—*Idem.* p. 91. 3. The defendant, therefore, contends, that, by the plaintiff's own showing a justice of the peace had jurisdiction of said cause ; as the plaintiff, in his said declaration, neither claims nor demands a sum greater than one hundred dollars ; and, by the act aforesaid, justices of the peace have jurisdic-



tion to that amount. And, this principle being admitted, the county court could not have jurisdiction over the same cause ; as, by the last recited act, county courts and justices of the peace can have concurrent jurisdiction in no civil cause whatever. And lastly, the defendant contends, that it is perfectly immaterial, whether the debit side of the plaintiff's original book is over one hundred dollars or not ; as the county court cannot travel out of the road to retain jurisdiction, when it plainly appears, on the face of the declaration, that the court have no jurisdiction. At all events, the plaintiff must be bound by his own declaration.

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HUTCHINSON, C. J.—This was an action on *book account*, originally commenced before the county court, claiming one hundred dollars to balance book accounts ; and laying the *ad damnum* at \$100. And the question now raised is, whether the county court had jurisdiction of such a suit. The plaintiff contends, that he has declared for the balance, as he must do by the statute ; and not the balance, but the debit side of his account, regulates the jurisdiction. This, at first view, derives a plausibility from the circumstance, that the sum declared for as a balance, is the highest sum of which a justice of the peace can take jurisdiction ; and there is a sort of implication, that the sum claimed as a balance, is less than the whole sum charged. This, however, is but inference, and that very slight, when we reflect that the declaration, following the statute form, would be just the same, whether there were credits on the plaintiff's book or not.

The statutes admit of no concurrent jurisdiction in the county courts and justice courts. Justices of the peace have jurisdiction in civil matters, to the amount of one hundred dollars, by express statute. Another statute, by equally plain expressions, prohibits the county courts from taking cognisance of any cause, of which a justice of the peace might take cognisance.

If this suit had been brought before a justice of the peace, no objection to his jurisdiction would appear upon the writ. If, when the plaintiff produced his account, the debit side exceeded one hundred dollars, the justice could take no further jurisdiction of the action. So, if the plaintiff, in his county court writ, had declared for more than one hundred dollars, yet, if the debit side of his account, when produced, did not exceed one hundred dollars, neither the county court, nor the auditors by them appointed, could hold further jurisdiction of the action. The result is, that the plaintiff's writ must be so drawn, as to present a case with-

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in the jurisdiction of the court, before which he brings his action ; and he must keep within that jurisdiction, when he exhibits his testimony.

But the plaintiff is disposed to consider a doctrine inconsistent with propriety, which would require him to insert a falsehood into his writ, in order to give jurisdiction to the only court that can hold jurisdiction over his claim. There is no need of this in the present case, or any one similar. The statute form for this book account action is very ancient ; and later statutes have varied the rights of parties, and the forms should not be considered so literally binding upon suitors, as to exclude any substantial right, or any fact necessary to show what court has jurisdiction. If the plaintiff's account, in this case, exceeded one hundred dollars, and a balance of ten dollars, only, was claimed, he must sue at the county court, because the statute is so, and because the defendant has the same right to controvert each item of the plaintiff's account, that he would have if the whole were claimed as due. Yet the plaintiff might declare according to fact : he might declare for a balance of ten dollars, and add, that the debit side of his account exceeds one hundred dollars. Thus the difficulty suggested would be avoided. Moreover, it is not very probable that the plaintiff claims that the exact sum declared for, is due to him ; but he has used such a round number as seemed convenient. If this was the case, adding another dollar, and thereby removing all doubt about the jurisdiction of the court, could not have involved very serious scruples of conscience. In conclusion, the county court had no jurisdiction of this action ; and their judgement of dismissal must be affirmed.



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ASAPH FLETCHER, JUN. vs. JAMES, JOSIAH and SAMUEL PRATT.

When an officer neglects to make an entry on an execution, of the true day, month and year, when he received it, and the same becomes important to support his lien upon the property, for which a suit is brought, the court will not permit such officer to make the entry *nunc pro tunc*, so as to affect the suit then pending.

But such officer may support his lien by such parol proof, as would show the attaching creditor's lien upon the property kept good, as against the officer, who made the attachment.

This was an action of *trover*, which came up from the county court, on the following bill of exceptions :

“ This action was brought by the plaintiff, as sheriff of the county of Windsor against defendants, for converting to their own use a quantity of bricks, which had been attached on a writ in favor

of Job Richmond against *James and Josiah Pratt*. The defendants pleaded the general issue. Under this issue, the plaintiff gave in evidence true and attested copies of the writ and return on the original process in favour of said Richmond against the said *James and Josiah*, and the copies of the record of the judgement in said first suit, and of the execution and return thereon, which issued on the judgement aforesaid. To this execution the defendants objected for the cause, that a minute of the officer's endorsement upon the execution of the true time when he received it for collection, did not appear upon the same; and that, therefore, the plaintiff had lost his lien upon said bricks created by his attachment: and the objection was sustained by the court, and the evidence rejected. The plaintiff then offered to prove, by parol evidence, viz, by the testimony of Job Lyman, esq., accompanied by the receipt of the sheriff's deputy, who had the said execution, the true day, month, and year, when the same was delivered to the said deputy sheriff, which was within thirty days next after the rendition of the judgement. But the court rejected the evidence thus offered, and refused to admit the witness. The plaintiff then produced in court the said sheriff's deputy, and requested the court to permit the deputy to make said minute upon the execution *nunc pro tunc*, offering his receipt to assist the deputy's memory as to the time when he actually received said execution. To the admission of this evidence the defendants' counsel objected, and the same was excluded by the court. The said writ and execution are also made a part of this case, together with all the copies of the records, and original receipts and papers pertaining to said case. To which opinions of the court, in excluding the said files, records, receipts, and testimony, offered by plaintiff as aforesaid, the plaintiff excepted; and the case is ordered to pass to the Supreme Court for their decision upon the premises."

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*Mr. Marsh, for the plaintiff.*—It appears to plaintiff's counsel, that the court has entirely mistaken the object of the section of the statute, in requiring the officer to make an entry of the day and year of his receiving such execution. The statute explains itself, in the subsequent part of the same section, by enacting, "That, when the officer receives several executions against the same person, the execution first delivered shall be first served, or first satisfied." Whereas the lien, created by attachment, is regulated by a different statute; (*Stat. p. 68, s. 33*;) which provides, that personal property, taken by attachment, shall be holden thirty days after the rendition of final judgement; and if not taken in execution within thirty days, shall be discharged from such attachment, and be no further holden to answer said judgement, than if the same had not been attached. In the case of *Enos vs.*

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*Brown*, (1 *D. Chip. Rep.* 280,) it was decided, that, when property is taken on attachment, and the plaintiff within thirty days, takes out execution, and delivers it to the same officer, who made the attachment, this is equivalent to taking the property in execution, and continues the lien. The plaintiff, in such case, has done all that he can, and all that is required of him ; and let the officer do what he may in making the entry required, the statute is complied with, and the lien created by the attachment continues. The plaintiff cannot compel the officer to make the entry, and is not, therefore, to lose his lien. Whether the execution was actually delivered to the officer within the thirty days, is matter *in pais*, and may be proved like any other fact.

*Mr. Cushman*, on the same side, added, That the object of the tenth section of the statute was to fix definitely the rights of different creditors, attaching the same property at nearly the same time, and does not affect the right of the creditor, as to his debtor ; and parol testimony was admissible to show the execution delivered out in season to preserve the plaintiff's lien—That the defendants set up this defence in their own wrong : for they converted the property to their own use, when the execution was in the possession of the officer, and when the defendants cannot be presumed to have known, that the officer had omitted to enter the time of his receiving the execution—That this statute is nugatory and unconstitutional, requiring the officer to do a service without fee or reward ; a service, too, which he never stipulated to perform—That the creditor could not compel the officer to make this entry upon the execution : and where would be his remedy, if parol testimony is not admissible to prove when the execution is in fact delivered to the officer ? This would be turning about the maxim, that the law favours the vigilant : and the vigilant creditor would lose his lien upon the property, by the want of vigilance and care in the officer to whom he delivers his execution.

On the 68th page of the revised laws, (*sec.* 33,) is found the law regulating the term, during which personal chattels shall be holden after final judgement, which have been attached on *mesne process*. This Court have decided, I believe, that delivering the execution to the officer within thirty days after judgement, is the taking of said property in execution, so far as to preserve the lien. Now, to show the time of delivering the execution to the officer in such a case, this statute does not point out any particular mode of doing it. Consequently, it is left to be proved at

common law, by parol, as any other case would be where no distinction made was indicated. A mere memorandum, entered upon the back of an execution at the time of the receipt of it by the officer, unless expressly made evidence by the statute in this case, would be no evidence of the delivery within thirty days under this section.

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*E. Hutchinson, for the defendants.*—The evidence offered by plaintiff was properly excluded. A sheriff's lien, by which he may justify retaining the possession of personal property, attached, as against the general owner, is a right created by statute, in derogation of the principles of common law, that a man has the right to that which is his own. And, wherever such a right is conferred by statute, the authority must be pursued *strictly*. In the case of personal property, attached on *mesne process*, the officer's lien is discharged, unless execution be put into his hands within thirty days from the rendition of final judgement. So also of bail, when the body is taken.—*Statute, p. 68, sec. 33 and 34, passed March 2, 1797; Johnson vs. Edson, 2 Aikens' Rep. 302.* His lien is likewise discharged, unless the property be levied on within the life of the execution.—*Barnard vs. Stevens et al. 2 Aikens' Rep. 429.* On both those points the legislature have required *record evidence*, to appear from the doings of the officer on the execution itself.—*Statute, p. 213, sec. 10; also, page 209, sec. 1. passed March 7, 1797.* It is difficult assigning a reason why the kind of evidence required by statute should be strictly adhered to by the court in one case, if it is to be dispensed with in the other. Were the statute rule to be disregarded on this point, the next step might permit an officer to justify the taking of property, merely by parol proof that he had a writ, without the ceremony of any return whatever. In short, were the evidence offered in this case to be pronounced admissible, no reason now suggests itself, why the court might not, with equal propriety, go on dispensing, one by one, with those salutary barriers which the legislature have found it necessary to interpose against the treachery of human memory, and the perjury of witnesses, until every particle of record evidence, required by statute, is done away; and the proof of the important facts, the doings of our sheriff department, in the service and return of legal process, exist entirely in parol. See *Overseers of Reading vs. Overseers of Weathersfield, 3 Vt. Rep. 349.*

The application to the county court, to permit the plaintiff

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to amend his proceedings upon the execution on the trial, was very properly refused. He could not have expected permission from the court either himself, or by his deputy, to create record evidence, after he had acquired an interest in the fact, and that, too, during the trial of a cause in which he was plaintiff, and without which he could not, under the decision of the court, recover. Had the request been granted, the evidence must still have been excluded, for the reason, that, by plaintiff's own showing, the minute could not have been made *at the time* required by statute.—See *Stat. p. 213 ; New-Haven vs. Vergennes, 3 Vt. Rep. 89.* Again, even if this Court should consider that the entry requested, ought to have been permitted on the trial, still it is no ground for reversal of judgement ; the application being not a matter of strict right, but addressed to the sound discretion of the court to be granted or refused, as might be deemed proper.—*Barnard vs. Stevens et al. 2 Aik. Rep. 429.*

HUTCHINSON, C. J., *pronounced the opinion of the Court.*—Some of these defendants were the original owners of the bricks in question ; and there seems to be no controversy but that the defendants used them, or some part of them, as their own, so as to be a conversion, if the plaintiff had any good title to them. The plaintiff claims to have attached them on a writ of attachment in favor of one Job Richmond, and against *James and Josiah Pratt*, two of these defendants. The plaintiff did not move the bricks, but left a copy of the writ at the town clerk's office, as he might by statute, in stead of moving them. The only points litigated before this Court relate to the evidence by which the plaintiff may show, that his lien upon the property, created by the attachment, is preserved. The execution produced by the plaintiff has no minute upon it of the true time when it was received by him or his deputy ; and the plaintiff offered to prove by a witness and the receipt given for the execution, that it was delivered out within thirty days from the rendition of the judgement. This was objected to, and rejected. It seems that the county court considered it necessary for the plaintiff, in making out title under his own act, or acts, to show his acts by such testimony as the law made it his duty to furnish. That is, he must show his attachment, creating the lien, by his return upon the writ ; and the continuance of his lien, by his entry of the true day, month and year, when he received the execution. I recollect this was my view at the county court. But the subject has been under consideration in one or two cases in Chittenden

county, and we deem it settled, that, if the creditor preserves his lien upon the property as against the attaching officer, by giving out his execution within the thirty days, that establishes the lien upon the same property in favor of the officer. And, upon due reflection, we think, the same evidence, which would avail the creditor, as against the sheriff, ought to avail the sheriff as against any persons who may have converted the same property. The evidence offered in this case, the testimony of the witness who took the receipt for the execution, and the receipt itself, would have been admissible for the creditor, and, we think, ought to have been admitted in the trial of this cause, to show title in plaintiff. The application of the plaintiff for permission to make the entry of the time when the execution was received, *nunc pro tunc*, was rightly refused. It was too late for him to furnish evidence for himself of a transaction so long past.

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The judgement of the county court is reversed, and a new trial is granted.



STILLMAN, WELLS & Co. rs. TRUMAN BARNEY.

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A defendant, in a suit upon a prison bond, is not, by the recital in such bond of the rendition of a judgement, and the issuing of execution, &c., estopped from pleading *nul tiel record* of such judgement.

This was a suit on a jail bond, assigned by the sheriff to the plaintiffs, who were the creditors of said defendant. The bond was in the form prescribed by the statute, and the writ was in the usual form of writs upon such bonds, so assigned. *Barney* was the original debtor, and his bail, the other signers of the bond, were not found by the officer serving the writ. The defendant pleaded, that there was no record of any such judgement remaining, &c. To this plea the plaintiffs replied, that the defendant ought not to be admitted to plead this plea, because the judgement was recited in the prison bond, and his signing and sealing the bond was an acknowledgement of the judgement. To this replication there was a demurrer. The action was brought by appeal from the county court: and the question now litigated was, whether the plaintiff's replication was good and effectual to estop the defendant from pleading *nul tiel record*, of the judgement, described in the prison bond.

*Mr. Adams*, in support of the demurrer.—The recital in the bond is,—“Whereas *Truman Barney*, now a prisoner by virtue of an



CHITTEKDEN, " execution issued on a judgement, recovered before the county  
 January, " court, holden at Burlington, within and for the county of Chit-  
 1832. tenden, on the last Monday of March, 1826." The defendant  
 Stillman et al. contends, that this is not such an admission, as amounts to an es-  
 vs. toppel. The general doctrine of the books is, that an admission  
 Barney. under seal binds the party. This we need not deny, but we do  
 deny its application to cases like this. It does not follow that  
 every fact, which is alluded to, is, therefore, admitted. A recital  
 in a bond may, or may not, be binding, according to circumstan-  
 ces. If the attention of the party is called to that particular point,  
 and it is apparent that he intended to admit it, that will be bind-  
 ing, but otherwise, not. The cases of *Rainsford vs. Smith*, 2  
*Dyer*, 196, and *Shelly vs. Wright, Willes*, 9, and *Willoughby*  
*vs. Brook, Cro. Eliz.* 756, are in point, to show what sort of an  
 admission is binding. But a naked recital in the condition of a  
 bond is not an estoppel. In *Co. Lit.* 352-6, it is said, " Every  
 " estoppel ought to be a precise affirmation of that which maketh  
 " the estoppel. Neither doth a recital conclude, because it is no  
 " direct affirmation." In a note to the case in *Dyer*, it was said,  
 that a recital is no estoppel. So in *Skipwith vs. Green*, 1  
*Stra.* 610, the court decided, that the recital in a lease was not  
 binding. To the same point is *Freeland vs. Burt*, 1 *T. Rep.*  
 701. In *Fairtitle vs. Gilbert*, 2 *T. Rep.* 169, the court admit-  
 ted the party to contend against his own mortgage, and deny his  
 power to convey. So in *Hayne vs. Maltby*, 3 *T. Rep.* 438, the court  
 decided that the party was not estopped by his covenant. From the  
 nature of the transaction, it is evident, that the attention of the  
 party was not called to the particular language of the bond. No  
 one ever reads a jail bond. If not taken according to law, it is  
 not binding. In this respect, there is a manifest difference be-  
 tween a private bond and an official bond. The language of  
 the condition is rather the language of the obligee. The bond  
 would have been good, if the condition had been written on the  
 back, or subsequent to the signing. In either case, it is evident  
 that no recital could be binding upon the party by estoppel.

But the most important consideration arises from the perilous  
 situation in which parties must be placed, if this doctrine of es-  
 toppel is established. If an execution issue upon a false judge-  
 ment, it is difficult to perceive that any remedy exists. A *habeas*  
*corpus* could not be granted. A writ of error would not lie. If  
 the money is paid, the party is bound by the payment, and, for  
 aught that appears, the party would be compelled to lie in jail, and

bring his action for false imprisonment. There is no necessity of extending the doctrine of estoppels to jail bonds, because, if there is such a judgement, it is matter of record, and can readily be proved. So general is the practice of signing bonds without examination, that, if the party is estopped, he will be liable to great abuse arising from the mistakes and fraud of jailors. The doctrine of estoppels has no application to matters of record.—*Fair-title vs. Gilbert, ante*. It relates rather to such matters as are exclusively without the knowledge of the parties. It is not necessary that the suit should be upon the bond in order to make an estoppel. If estopped at all, the party must be estopped from denying the fact, whenever that fact is drawn in question. If the party could not plead *nul til record*, neither could he plead specially, that, after judgement and execution and bond, a new trial had been granted, or writ of error brought, and judgment reversed. No one can be allowed to do that circuitously, which he could not do directly.

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*The plaintiff's counsel contended*, that the defendant was estopped, by the recital of the judgement in the bond, to deny the existence of that judgement, on which the bond was founded; and they cited 1 *Chit. Plead.* 575; 6 *Term Rep.* 62; 1 *Saund.* 325, n. 4.

THOMPSON, J., *pronounced the opinion of the Court*.—The only question in this case is, whether the defendant, by the recital in the bond, has admitted the record of the judgement contained in such recital. The form, or mode of recital, adopted in the bond, commencing with a "whereas," &c., is, probably, as binding upon the defendant, as any other mode of recital. It was unquestionably necessary for the plaintiff to set out the condition of the bond; because it is an official bond, and one which the sheriff would wish to assign to the creditors, pursuant to the statute, and save himself from a suit for the escape; and it would answer him no such purpose, nor be assignable at all at law, unless taken conformably to the requisitions of the statute: and the statute has given a form, which has been followed in the present case, and which requires the recital of the judgement, execution, commitment fees, &c. It was equally necessary to allege, by direct averment, the recovery of the judgement, in order to show the imprisonment legal. It would seem to involve an absurdity, that the plaintiff should be obliged to aver a material fact, as a substantive ground

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of recovery, which the defendant is not at liberty to deny. The Court are not prepared to say, that any form of recital, directed by the statute in such a case, would amount to an admission of the record, so as to estop the defendant from putting the plaintiff upon proof of the record. The adoption of such a doctrine might often operate with great severity upon prisoners. The statute has prescribed the form of the condition of these prison bonds; and the prisoner, whether legally or illegally imprisoned, must either execute such a bond, or seek relief in some more expensive, or inconvenient mode. Suppose the execution has issued for a wrong sum in damages and cost; and another issues for the true sum. How is the debtor to avoid either? If he obtains the liberties of the prison by giving a bond in each case, that would acknowledge each to be correct, upon this principle. Again, suppose the judgement to have been rendered by a court having no jurisdiction. In such a case, a person imprisoned upon the execution, which has no judgement to support it, is unlawfully imprisoned, and is in duress. And if in such a case, he cannot, for the purpose of extricating himself, adopt a remedy, which the statute has prescribed, without acknowledging the validity of the claim, it would seem that the law has furnished a summary method of purging the unlawfulness of false imprisonment. Besides, the bond as clearly admits the official authority of the sheriff, as the existence and validity of the record; and cannot his authority be denied? But the Court do not consider the recital as amounting in *fact* to an admission of the record. It is to be regarded merely as a description of the execution; as an acknowledgement, merely, that the debtor is in prison upon an execution of such a description, and purporting to have issued upon a judgement rendered at such a time, and before such a court, &c. If the defendant chooses to place his whole defence on the ground of there being no judgement to warrant the execution and the imprisonment, this imposes no hardship upon the plaintiff. If there is such a record, he can easily produce a transcript of it. If there is no such record, he ought to fail in his suit. Let judgement be entered, that the replication is insufficient.

Upon a suggestion, that different pleadings, would show merits in the action, the plaintiff had leave to withdraw his replication and reply anew, on payment of costs, &c.

*Bailey & Marsh*, for plaintiffs.

*C. Adams & Leavenworth*, for defendant.

**SAMUEL DODGE, administrator of ELIZABETH PRINCE, vs. MIND-  
WELL PRINCE and JOHN PRINCE.**

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1831.

The necessary intendment, in an officer's return on an execution of an appraisal of land at its *true value in money*, is the true value at the time of such appraisal.

The officer making demand of payment at the house of the debtor, when he is absent from the state, is sufficient to authorize a levy of an execution on land.

The attorney, whose name is certified on an execution, as attorney of the party, is such for the purpose of prosecuting or defending the suit and receiving pay, but not for the purpose of appointing appraisers, unless he has a special appointment for that purpose.

The officer, in returning that the appraisers were appointed by a justice of the peace, must state that he was one, who by law might judge between the parties in civil causes, unless he adopts the generality of an ancient approved form.

This action was brought up from the county court on the following bill of exceptions, to wit :

" *Ejectment* for twenty-six acres and four rods of land in Johnson. *Plea, not guilty.*—The plaintiff claimed title to the land sued for, under the levy of an execution in favor of *Elizabeth Prince*, the intestate, against one *John Prince*; and in support of the title, offered in evidence the record of a judgement in favor of said *Elizabeth Prince*, against the said *John Prince*, rendered by Franklin county court, September term, 1826: and of an execution issued on said judgement, dated October 2, 1826, with the officer's return thereon, showing a levy of the same on the lands in question, October 19, 1826; the execution and return thereon having been duly recorded in the proper offices. To the admission of the record aforesaid, in evidence, the counsel for the defendant objected, on the ground of various defects alleged to appear in the return of the officer, and particularly because it did not appear that the officer applied to, or gave any notice to, the said *John Prince*, to appoint appraisers, or to the attorney of the said *John* in the suit in which the judgement was rendered, appearing of record therein; but the objections were overruled, and the record admitted, which is to be referred to on the hearing of these exceptions. It appeared that the said *John Prince*, at the time of the levy of the execution, and for many years before, was absent from this state; that he was seized in fee of the lands in question, before and at the time of the levy; and that the defendants were in possession of the same at the commencement of this action. Whereupon the court instructed the jury, that the levy of the execution was good and valid in law, and that, on the facts aforesaid, the plaintiff was entitled to recover. To the several opinions of the court aforesaid, the counsel for the defendants excepted; and a verdict for the plaintiff being returned, and judgement rendered thereon, it was ordered, that execution be stayed and the cause removed to the Supreme Court."

On inspecting the record it appeared, the officer, who had levied the execution on the premises, had stated in his

**FRANKLIN,** return that he applied to the said *Mindwell Prince*, who was the  
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 wife of the debtor, and requested her to appoint one appraiser, and to agree on a third, and that she refusing so to do, he made application to Daniel Dodge, one of the justices of the peace in and for the county of Franklin, who appointed three appraisers, who were by him sworn to appraise the premises, "according to the true and just value thereof in money."

*Aldis and Davis, for the defendants.*—Where an execution is levied upon lands, every thing required by law to pass the property must appear, by the return of the officer, to have been done.—*Williams vs. Amory*, 14 Mass. Rep. 20 ; *Eddy vs. Knapp*, 2 Mass. Rep. 154.

1. It does not appear, that the officer administered to the appraisers the oath, which the statute requires. They ought to have been sworn to appraise the estate "according to the present true and just value thereof in money." But it appears they were sworn to appraise it "according to the true and just value thereof," &c., without designating the period when its value was what they were to adjudge it to be.

2. It does not appear from the officer's return, that *Mindwell Prince* was such an agent as the law requires to be notified of the appointment of appraisers. She was the wife of the debtor, and it does not appear, she had any authority to appoint appraisers, or had any authority whatever from *John Prince*, except what she derived from being his wife. The wife is not such an agent as is meant by the statute. It must be one whose agency is a matter of record, so that the court may know whether he is agent or not. The officer's decision, that such a person is the agent of the debtor, and has the right to appoint appraisers, is not conclusive. But it is contended, that, when there is a known attorney of record, whose name is endorsed on the execution, he, in the absence of the debtor, has the exclusive authority to agree upon, or appoint, appraisers. In the present case, there were three attorneys for the debtor, *John Prince*, whose names were all endorsed on the execution. These were persons whom the debtor had entrusted with the management of the suit, and they alone had authority to act for him in all things relating thereto. The officer ought, therefore, to have applied to them, or to one of them, to appoint an appraiser ; and not having done so, the levy is void.

3. The officer ought to have procured some justice of the peace to appoint appraisers, who by law could judge between the parties

in civil causes ; and it should have been so stated in the return. But it does not appear by the return, that the appointment was made by such a qualified and disinterested magistrate. The officer states, that he applied to Daniel Dodge, justice peace, &c.; but does not state that he could legally judge between the parties.—*3 Vt. Rep. 352, Reading vs. Weathersfield.*

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*Hunt and Beardsley, contra.*—1. The plaintiff contends, that the judgement, execution and levy, were correct, and properly admitted by the court ; that, as *John Prince* had for a long time been absent from this state, and *Mindwell Prince*, the wife of the said *John*, had, for more than 10 years, acted as the known agent of the said *John*, the officer, who made the levy, did right in calling on her to appoint an appraiser ; and this superceded all necessity of calling on the attorney of record in the suit in which the execution issued.—*Stat. p. 210, s. 4.*

2. That *Mindwell Prince*, and also the plaintiff in the execution, both neglecting to appoint appraisers, it was the duty of the officer, who levied the execution, to call on a justice of the peace, who by law could try civil causes between the parties, to appoint the appraisers ; which he did : and the said justice had full power to appoint, and did appoint, three judicious disinterested freeholders of the town and county where the land lay, who did appraise the land at its just value in money ; and that the return of the officer is in all other respects is good and valid.—*Idem ; Hathaway vs. Phelps, 2 Aik. 84.*

*The opinion of the Court was pronounced by*

THOMPSON, J.—The plaintiff claims title to the premises under the levy of an execution ; and whether this levy, as it appears in the officer's return, be regular or not, is all we have to decide.

The *first* objection to this levy is, that it does not appear that the appraisers were sworn to appraise the land at its just value at the time of their appraisal. We think the necessary intendment, from the officer's return, is, that the oath bound them to appraise, and that they did appraise, at its then value.

The *second* objection to the levy is, that the officer did not call upon the attorney of record to appoint appraisers. With regard to this objection, the return showing that the debtor was absent from the state, a demand at his last usual abode in the state was sufficient. And, indeed, a demand could not, under the circumstances, be made in any other way. The attorney on the execution is not an attorney or agent within the meaning of the statute.

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He is attorney merely for the purpose of prosecuting or defending the suit to judgement, and receiving payment : and his discharge of the execution without receiving payment would not be binding on his client. This point was decided by this Court at Burlington, at the recent term, in the case of *Galusha vs. Sinclair*.\*

The other point, relied upon by the defendant, involves very serious difficulties. The appraisers were appointed by a justice of the peace, and yet the return of the officer does not show that he was such a justice as might judge between the parties in civil causes. That he should be such, is the express requisition of the statute. At an early day, the form of a levy was prepared and published by an eminent jurist *Judge Chipman* : and that form has been generally followed by officers ; and the title to such an immense amount of land depends on levies, made agreeable to that form, that courts have felt constrained to sanction them. That form, it will be recollected, describes the appraisal as made by A B, &c., " chosen, appointed, and sworn, according to law." This form necessarily includes all the requisites of the statute. The objection to it is, that the officer makes himself the judge of what is agreeable to law, instead of returning the facts, that the court may judge of the law ; and this objection would be too formidable to be surmounted, if the form had been recently adopted. But the Court has not as yet decided that a levy is valid, when the officer undertakes to detail his proceedings, and omits a material requisite of the statute. If we dispense with this, we see no reason why, when this is not wanting, we may not dispense with any or all the others. If we consider this levy, with this defect, *prima facie* good, and allow it to be impeached by parol evidence, the same course must be adopted when other material requisites are wanting ; and the consequence would necessarily result, that the whole burden of proof would be changed from the creditor to the debtor. It is insisted by the plaintiff's counsel, that the officer is made judge of the fitness of the justice. Upon this point, it may be remarked, that it does not appear from the return, in this case, that he has undertaken to judge. If his return, upon the face of it, showed a compliance with the statute, it would be presumed to be true, until proved to be false. But, in such a case, if he had applied to a justice, who was interested, or related, the fact might be shown, and the levy thereby avoided. But there is a manifest difference between impeaching a levy, apparently good, and supporting one by parol, which is

\*See 3 Vt. Rep. 304.



apparently void. Upon the whole, we consider this objection as fatal to the levy.

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The judgement of the county court is, therefore, reversed, and a new trial granted.

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WILLIAMS, J., dissented.



ERASTUS CHURCH vs. IRA A. VANDUZEE.

FRANKLIN,  
January,  
1831.

Where one sues before a justice of the peace, in an action on *book account*, and sets, his *ad damnum* at ten dollars only, and yet exhibits an account against the defendant of \$10,67, and recovers the ten dollars demanded, the action is appealable.

The plaintiff cannot take away a jurisdiction, given in his writ, nor take away the right of appeal, by exhibiting a less account, than his writ would authorize, nor by setting his *ad damnum* lower, than the *debit* side of his account.

This was an action on *book account*, brought before a justice of the peace, where the plaintiff recovered judgement, and the defendant appealed to the county court. The plaintiff filed his motion, at December term, 1828, to dismiss the appeal, because the action was not appealable. This motion was overruled by the court, and judgement was rendered to account, and the cause submitted to an auditor, who, at April term, 1830, made his report in favor of the defendant. The plaintiff filed his objections to the report on the ground, that the county court had not jurisdiction. He also filed a motion to dismiss the action, similar to the one filed before the cause went out to the auditor. No question of law was raised upon any decision of the auditor. He decided in favor of the defendant, on the ground that the plaintiff did not support his account in point of proof. The motions to dismiss were predicated on the following matters, apparent of record, to wit: The plaintiff laid his *ad damnum* at ten dollars only; but the justice's record shows that the plaintiff's account, exhibited in support of his action, amounted to \$10,67; and the defendant there exhibited an account of \$14,11, but adduced no evidence in support of it. The plaintiff recovered his ten dollars demanded. The auditor's report contained a copy of the plaintiff's account exhibited before him, amounting to \$14,67. He also reported, that the defendant exhibited before him no account at all; but relied upon showing, that all the plaintiff's account which ever was a proper charge against him, had been settled and paid. The county court refused to dismiss the action, and rendered judgement on the report for the defendant to recover his cost.

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The plaintiff excepted to this decision, and brought the case to this Court.

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*The plaintiff's counsel* now urged in argument, that, in an action on *book account*, the jurisdiction of the court is determined by the *ad damnum* in the plaintiff's writ. They cited the case of *Reynolds and wife vs. Robinson*, decided in Franklin county, Supreme Court, January term, 1822. They also contended, that a plea in offset, unsupported by any evidence, would not make the cause appealable ; and cited the case of *Brush vs. Hurlburt*, decided in the same county, at the January term, 1830.\*

*The defendant's counsel, contra.*—1. The words of the statute are, “ That the judgement of a justice of the peace shall be final “ between the parties in all cases, where the sum demanded does “ not exceed ten dollars.”—*Statute, page, 139.* The justice's record says expressly, in this case, that the plaintiff demanded \$10,67, and that the parties did litigate an account in favor of the plaintiff of more than \$10,00. The construction, we put upon this statute, is, that, where the plaintiff or defendant does not produce an account of more than \$10,00, the judgement of the justice shall be final. The *ad damnum* is not to govern in these cases ; because the action is brought to recover a balance on book ; and the plaintiff may have an account amounting to \$100,00 against the defendant, and yet there may not be \$10,00 due the plaintiff. And it was never supposed, that, where the plaintiff introduced an account amounting to \$100,00, and there was not \$10,00 due to the plaintiff, the cause was final before a justice.

2. This cause was appealable, because the defendant offered an account in offset, amounting to \$14,11 ; and the defendant was not obliged to offer any evidence in support of his account. His witnesses might not have been present : they might have been out of the country, so that he could not have procured their attendance ; and the appeal might have been taken for the very purpose of procuring their testimony.

3. The justice has certified, that the defendant offered no evidence to *prove* his account. This certificate is not to conclude the defendant. 1st. Because the justice is not a certifying officer to certify evidence to this court. 2d. The justice could only certify up the record ; and the evidence introduced on trial before the justice is no part of the record. 3d. This certificate may be ta-

\* See 3 Vt. Reports, 46.

ken to be true, and yet the whole cause might have turned upon the trial of the defendant's account.

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4. The defendant's offering no account before the auditor, is not evidence that the cause was not appealable. The defendant relied upon the plaintiff's account being settled; and this was his first defence; and, if he proved to the satisfaction of the auditor, that the parties had settled, he could not plead his account in offset.

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5. The Court will not support the plaintiff's objections to the report, when the plaintiff has pleaded to the merits of the action, and a trial has been had; and a report for the defendant, and a judgement rendered on this report.

THOMPSON, J., *pronounced the opinion of the Court.*—The plaintiff's counsel contend, that the county court erred in not dismissing the action on one or the other of the plaintiff's motions for that purpose; and thus contend for the following proposition: "That, whenever, from the nature of the action, the damages, to be recovered, are necessarily uncertain, the sum demanded must determine the jurisdiction, and the right of appeal." In support of this, they rely upon a decision, made in this county, but not reported, in the case of *Reynolds and wife vs. Robinson*, decided in January, 1822. In that case, the plaintiff demanded twenty dollars, and recovered \$1,67. It does not appear what account was exhibited before the justice. Before the county court, his account, upon oyer, was one calf skin \$1,50. Interest 51 cents. And the writ of error leaves it uncertain whether the defendant exhibited any account before the justice. The county court dismissed the action, and the defendant and appellant brought his writ of error; and the Supreme Court reversed the decision. It is unnecessary, that this Court should pronounce upon the correctness of that decision. If it were, we should probably have no difficulty in saying, that, when the plaintiff has made his cause appealable, by demanding twenty dollars, he cannot afterwards, and especially after an appeal, drive the defendant out of court, by exhibiting a smaller account in oyer. The plaintiff relies, also, upon the decision in the case of *Brush vs. Hurlburt*, made in this Court at the last term. That was an action on book account. The plaintiff laid his *ad damnum* at eight dollars. The defendant filed, or exhibited, an account of \$23, in his defence. This was clearly not appealable unless made so by the exhibition of the defendant's account; and that being found to be wholly fictitious,

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the appeal, which had been taken by the defendant, was dismissed.

The proposition, contended for, is unquestionably correct in many cases, as trespass, trover, covenant, trespass on the case, &c.; but it is by no means of universal application.

In the present case, the sum demanded was \$10. The account exhibited was \$10,67. This presents the same question, as if the account exhibited had been \$100. In either case, the defendant may contest the whole account; and the court may be called to decide upon each and every item.

The right of appeal, surely, cannot be taken away by the plaintiff's demanding \$10, only, as a balance, or as the sum he will be satisfied with, when he presents, as the subject of controversy, an account of \$100. Nor can the plaintiff prevent an appeal, by selecting, from an entire account of \$100, items to the amount of \$10, any more than he could give the court jurisdiction, by demanding \$10, as the balance of an account of \$150; or by presenting a part only of such an account. Suppose the plaintiff should demand \$10, and exhibit a specification of money had and received, work and labour, and goods sold and delivered, to the amount of \$100, could the right of appeal be doubted? Or, if the specification should be more than \$100, could the want of jurisdiction be questioned?

The correct rule on the subject is this: when the plaintiff brings an action, sounding merely in damages, he may bring the subject matter within the jurisdiction of the court, or prevent an appeal by limiting his demand: but, when the action is upon an account, or a *chose in action*, the nominal amount must determine both the jurisdiction and the right of appeal. Upon these principles,

The judgement of the county court must be affirmed.

*Foster & Smalley & Adams*, for plaintiff.

*Brown & Bascom*, for defendant.

## ANSON HULL vs. AUSTIN FULLER.

FRANKLIN,  
January,  
1831.

The receiving a deed of a lot of land and taking actual possession under it, vests in the grantee a sufficient title to enable him to maintain an action on the case for the flowing of the land by one who has no right to flow it.

A deed describing a boundary line of land as running up the river to certain falls, "*thence continuing to run in such a direction as to include a mill-yard and the whole of a mill-pond, which may be raised by a dam on said falls to a certain road,*" determines the boundary of the land itself, and not the height to which the pond may be raised.

This action was tried at the county court, in Franklin county, at September term, 1830, *Chief Justice Prentiss* presiding. The plaintiff obtained a verdict; and the action was brought to this Court for a hearing upon the points contained in the following bill of exceptions:—

" This was an action *on the case* for erecting a mill dam on lot no. 21, in Enosburgh, across a certain stream, and flowing the water of said stream on to the plaintiff's land in Enosburgh, being lot no. 216, as by the declaration appears. Plea, *not guilty*. The plaintiff produced and read a deed from Eliphalet Dickinson to himself, dated June 3d, 1823, duly acknowledged and recorded, of certain lands in Enosburgh, described by metes and bounds, and known by name of lot no. 216. He also proved, that, in May, 1824, the defendant, being then the owner of lot no. 21, which adjoined the plaintiff's lot, built a dam thereon across said stream, which caused the water of said stream to flow on to the land included in the aforesaid deed to the plaintiff, and to cover from twelve to fifteen acres thereof; and that the plaintiff commenced a possession on lot no. 216, under the deed aforesaid, by cutting down the trees, on about half an acre thereof in order to clear the same, prior to the erection of said dam by the defendant, which possession was followed up by improvements afterwards made on the lot by the plaintiff. On this evidence the counsel for the defendant insisted, that the plaintiff had shewn no title to lot no. 216; and moved for a nonsuit. But the court decided, that the deed from Dickinson to the plaintiff and possession by the plaintiff under the deed, were *prima facie* sufficient evidence of title in the plaintiff; and overruled the motion for a nonsuit. The defendant gave in evidence a deed from Amos Fassett to Abiather Waldo, dated March 10, 1805, conveying said lot no. 21; and proved, that Waldo took possession of the lot under said deed, which possession was transferred by him to one Daniel Chilson, and by said Chilson to the defendant, prior to the execution of the aforesaid deed from Dickinson to the plaintiff. The defendant also proved, that, at the time of the execution of the deed from Fassett to Waldo, which is to be referred to on the hearing of these exceptions, the road, mentioned in said deed, passed over a point of rocks immediately at the end of said dam, and that the dam did not raise the water of said stream so high as

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the road in that particular place ; and the counsel for the defendant contended, that the deed conveyed the right of raising a dam to, and as high as, the road which passed over said point of rocks. But the court decided, that, by a just construction of the deed, the road mentioned therein limited the extent of the pond to be raised by a dam across said stream ; and the grantee under the deed had no right to erect a dam so as to flow the water to a greater extent than to the road, and consequently could not flow any part of the road thus prescribed as a limitation to the right. The defendant also proved, that, many years ago, the said Daniel Chilson built a dam in the same place where the defendant erected his dam, which flowed four or five acres of land : and, though not so high as the dam erected by the defendant, flowed the water over the lowest part of the road as it then ran, and that, in consequence thereof, the road was removed higher up the bank ; which dam continued until the defendant took possession of the lot no. 21, under the deed from Chilson to him, dated June 13, 1822 ; which is to be referred to on the hearing of this case. The court instructed the jury, amongst other things, that, if they found, that, by reason of the dam erected by the defendant, any part of lot no. 216, beyond the road mentioned in the deed from Fassett to Waldo, was flowed by water, which had not been flowed by the dam erected by Chilson, and that the plaintiff had entered into possession of lot no. 216, under his deed before the defendant erected his dam, and continued in possession thereof, the plaintiff was entitled to recover ; and they would give him such damages as he had sustained in consequence of his land having been thus flowed. To the several opinions of the court aforesaid, and the directions given to the jury, the counsel for the defendant excepted," &c.

After argument by *Smith* and *Brown*, for the defendant, and by *Hunt* and *Beardsley*, for the plaintiff,

**THOMPSON, J., delivered the opinion of the Court.**—The plaintiff, in the several counts of his declaration, complains of the defendant's flowing his, the plaintiff's, land, being lot no. 216, by means of a dam erected by the defendant, down the river, on lot no. 21, which adjoins said lot no. 216. The defendant pleaded the *general issue*, and the jury returned a verdict against him. On the bill of exceptions, allowed by the judges of the county court, the first question presented, is, whether the plaintiff showed a sufficient title to make a *prima facie* case against the defendant. The case shows, that, before the defendant erected his dam, the plaintiff obtained a deed of his lot, and took possession, by cutting the timber on about half an acre of the land, and following up the possession thus begun, claiming title to the whole lot under his

deed. From this showing, it must, as against a stranger to title, be presumed, that the plaintiff has a good title : and the fee cannot be presumed to be in any one, who may hereafter sue for the same cause, as urged by the defendant's counsel. This objection cannot avail the defendant, unless he shows title, or actual prior possession in himself, or those under whom he claims.

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The cause, then, must depend on the construction, which the Court shall give to the deed from Fasset to Waldo, under which the defendant claims. The prior possession of Chilson, though it might affect the measure of the plaintiff's damages, yet cannot affect the whole recovery, because Chilson's dam was lower, and his pond flowed less land, than those of the defendant. The descriptive part of the deed from Fasset to Waldo is as follows, to wit ; " Beginning at the N. W. corner of lot no. 21 ; thence running south 8 degrees west, about sixty rods to the south bank of the river ; thence running up said river on the south bank to the first falls ; thence continuing to run in such a direction, as to include a mill yard, and the whole of a mill pond, which may be raised by a dam on said falls, to a road that leads to the centre of Enosburgh ; thence easterly on said road to the north line of said lot no. 21 ; thence N. 82 degrees west, to the place of beginning." The plaintiff contends, that this deed must receive such construction, that the road shall limit the height and eastern boundary of the pond ; and that it will admit of no other construction. But the defendant contends, that it will admit of this, and two other constructions : 1st. That the pond might be raised as high as a dam, built at the falls across to the point of rocks, would raise it ; and 2d. that there is no limitation to the height of the pond, provided it should be raised by a dam on the falls ; that the reference to the road forms a boundary to the land, and not to the height or extent of the pond. It is to be remarked, that this deed is very vague and loose in many particulars. It gives neither courses nor distances in passing around the piece contemplated for a mill yard and pond. That is all left to be settled by what shall be found necessary, or obviously convenient. It is obvious, that the intention of the grantor was to convey land within some limits ; and not a mere privilege as to any part of the premises. It is equally obvious, that, in the description, the grantor had reference to the lines and boundaries of the land, rather than to any definite extent of the pond. The road, therefore, must have been regarded as the boundary of the land, and not as a limit of the pond. Upon any other construction, the land was wholly



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undefined ; for there is no boundary from the falls to the road, unless it be this around the mill-yard and pond ; and yet, when this boundary arrives at the road, it continues on by said road and the line of the lot to the place of beginning. This shows, that the description given, was given as a description of the land itself. The result of all this must be, that the height of the dam, and the height and extent of the pond, were not, in terms, limited at all. The law, however, would limit and control the enjoyment and use of the grant, to the erection of such a dam as would afford a reasonable use of the privilege. And, when such should be built, and such a pond raised, as would effect such object, the boundaries would thereby be established. The grantee would have a right to build such a dam as could be built at the falls, and of such a height as would well answer the purposes of the mills contemplated to be built there. If this construction be correct, it is very clear that the merits of the suit have not been tried ; because the decision was made wholly upon the ground, that the road fixed the height and extent of the pond. How far the privilege conveyed by this deed will be binding on the plaintiff, must depend on the facts which may be developed on a future trial.

• The judgement of the county court is reversed, and a new trial is granted.



RUTLAND,  
February,  
1831.

THE TOWN OF MIDDLETOWN, appellees, vs THE TOWN OF PAWLET, appellants.

On the trial of an appeal from an order of removal of a pauper, a plea, that the pauper was seized and possessed of a messuage and lands and tenements in his own right, is not sufficient, without adding, that he had a freehold estate therein.

This case came up from the county court on exceptions to the decision there made, and was submitted to this Court without argument ; and the facts, presented in the pleadings, sufficiently appear in the following opinion of the Court, pronounced by

THOMPSON, J.—We learn from the copies of the pleadings, &c., delivered to the Court, that the town of *Middletown* procured an order of removal, and an actual removal, of one Miner Branch and his family, from said *Middletown* to *Pawlet* ; and gave the notice which the statute requires. From this order, an appeal was taken to the county court, by said town of *Pawlet* ; and there duly entered for trial. The appellants, in presenting their defence, filed two pleas : first, That said pauper and his family were not,

nor were any of them, likely to become chargeable to said town of *Middletown*, at the time of making said order of removal. Secondly, that said pauper, at the time of said order of removal, was well seized and possessed, in his own right, of a certain messuage and lands and tenements, situate, lying and being, in *Middletown* aforesaid, on which he then resided with his said family. Both pleas concluded with a verification. The said town of *Middletown* replied to both these pleas, in one replication, that the said pauper and his family, at the time of making the order of removal, were likely to become chargeable to the town of *Middletown*; which they pray may be enquired of by the country. To this replication, the appellants demurred specially, setting down, among other causes, that said replication does not confess nor deny, nor otherwise answer, the matters and things, set forth by the appellants in their second plea in this behalf.

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On reading these pleadings it is obvious that the replication, professing to answer both pleas, entirely fails to answer the second plea. The only question, therefore, is, whether that plea contained sufficient matter to require any answer.

The appellants, in support of their second plea, rely upon the case of *Londonderry vs. Acton*, which was decided in Windsor county, at the February term of this Court, 1830.\* In that case, the pauper was seized of land in fee, having the absolute title, though the value was not great. From this he had been removed to Acton; and this Court decided that he was unduly removed, upon the principle that he could not be removed from his freehold estate. In the present case, the plea alleges that he was seized and possessed of land, &c., in his own right. The term seized is technically applicable to a freehold estate; but it can only be so by intendment, as it is often used to import a chattel interest only. A tenant for life can no more be said to be seized in his own right, than a tenant for years; for both are seized in the lessor's right. A person may be said to be seized of land, or possessed of goods and chattels. And, in some states, a man is deemed to be seized of land, for some purpose, when he is in by disseizin, and has no title but a naked possession. It is necessary that the plea should contain such direct averments, as will require no technical presumption to make them amount to a description of a freehold. We consider the second plea bad, and the replication is a sufficient answer to it; and the judgement of the county court, which was, that the replication was insufficient,

\* See 3 Vt. Reports, 122.

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must be reversed. But the appellants may amend their pleadings on terms. This they choose, and time is given for that purpose.

*Bates & Clark*, for appellees.

*Royce & Hodges*, for appellants.



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**JOSIAH CROFOOT vs. DARIUS MOORE.**

A promise to pay certain notes, signed by the promisee and another, is broken when those notes become payable; and the statute of limitations then begins to run.

Such a contract is not a contract of indemnity, but an action will lie upon it as soon as the pay-day arrives, without payment by the promisor.

In such a case, the common counts will not aid the plaintiff to avoid the statute of limitations.

This was an action of *assumpsit*, in several counts. The first count was special, setting forth a promise of the defendant to pay to one William Rockwell, the plaintiff's part, to wit, one equal half of two notes, made payable at times then future, and signed by the plaintiff and one Luther Park, when the same should become due and payable, and to indemnify and save harmless the plaintiff from any loss or damage for, or by reason of, the non-payment of the same. To this all the common money counts were added. The defendant pleaded, 1st. *non-assumpsit*, and issue was joined; and, 2dly. a plea in bar of *actio non accrevit infra sex annos*. To this the plaintiff replied, that the cause of action did accrue within six years, which he prayed might be enquired of by the country. At a jury trial in the county court, HUTCHINSON, Justice, presiding, the defendant obtained a verdict, and exceptions were taken to decisions, excluding evidence; and the following bill of exceptions was allowed, on which the action was brought up to this Court:

"On the trial of this cause, the plaintiff offered in evidence, under the amended count of his declaration, the paper marked A, and the two notes therein referred to, (the execution thereof being admitted by the defendant,) which was objected to by the defendant; and the court rejected the same. Said writings are made a part of this case. The plaintiff then offered the same papers under the count for money paid, in connexion with other facts, to show that the notes referred to in said paper, were paid by the plaintiff. Which testimony was objected to by the defendant, and rejected by the court. Whereupon the plaintiff excepted to said decision, &c."

The paper referred to as marked A, was as follows: "Whereas *Josiah Crofoot* has executed his two certain notes with Luther

Park, running to William Rockwell of Troy, for six tons of ochre each; I hereby agree to pay his part of said notes, for which I have received a full consideration.

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*Bennington, 27th April, 1818."*

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One of said notes was made payable May 20th, 1818, and the other in the month of June next following.

*Hall and Blackmer, for the plaintiff.*—1. The evidence ought to have been admitted under the special count. A contract should be declared upon according to its legal effect.—1 *Chit. Pl.* 299. The declaration is in the common form of declaring by surety against the principal, stating the promise to be to pay and indemnify from damage.—1 *Chit. Pl.* 88; 3 *Wils.* 346. The contract was, in its legal effect, a contract of indemnity. The great object in the construction of contracts is, to give effect to the intention of the parties; and the leading principle is, *that words are so to be construed, as to answer that purpose*; and to ascertain that intention, the situation of the parties, and the subject matter of their transactions, are to be taken into consideration.—1 *Swift's Dig.* 221; 8 *Mass.* 214; 10 *Mass.* 379. There is nothing in the language of this contract, that forbids its being deemed a contract of indemnity, provided the subject matter of the contract required it to be so, in order to carry into effect the intention of the parties. It is in the common language of a principal to his surety—*This is my debt to pay, and I will pay it when it becomes due.*—2 *Chit. Pl.* 88. This would always be deemed a contract of indemnity; because the surety would suffer no loss by the non-payment of the notes at the days, unless he himself was called upon; because the whole object of the parties would be answered by the principal's saving the surety harmless against the notes. The contract between *Crofoot* and *Moore* placed them precisely in the situation of surety and principal. *Crofoot* owed a debt to *Rockwell*, payable in ochre, and *Moore*, (to use the language of the contract,) *agreed to pay it*, not to *Crofoot*, but to *Rockwell*. *Moore*, as between him and *Crofoot*, became the principal, and *Crofoot* stood as surety. That this was the relationship of the parties, appears from the obvious fact, that *Crofoot* could have no interest in having his contract to *Rockwell* literally performed. Whether the ochre, delivered by *Moore* to *Rockwell*, was much or little, of good or bad quality, or whether *Moore* paid the notes with one dollar, or got them without payment, it was all one to *Crofoot*. *Crofoot* suffered no damage from the non-delivery of

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the ochre, unless, in consequence of it, he was called upon to pay the notes ; and his damage would be just the amount he was obliged to pay, and no more. The contract related to the *liability* of *Crofoot* upon his notes to *Rockwell*, and not to the *property*, with which the notes might be paid ; and *Moore's* contract would necessarily be fully performed, by saving him harmless from the consequences of that liability. If the promise had been to *pay Crofoot* the amount of the *Rockwell* notes, it would have manifested an intention of the parties to provide *Crofoot* with a fund, with which to pay the notes. But to give this contract that construction, would be to give it new language, and violate the plain intent of the parties.

2. The evidence ought to have been admitted under the count for money paid. If, in pursuing the letter of this contract, the Court should be of opinion that it was broken by the non-payment of the *Rockwell* notes at the day they became due, still, as it would be uncertain, whether *Crofoot* would ever be injured thereby, his damages would be merely nominal. The cause of action would not be perfected until the plaintiff had paid the money ; and, when paid, it being for a debt which *Moore* ought in equity to pay, the plaintiff would be entitled to recover under the count for money paid to his use. If the contract was broken by the non-payment of the notes, the case would be the same in principle as in case of an incumbrance of a mortgage upon land. A covenant against incumbrances would be broken on the execution of the deed ; but the grantee would be entitled to nominal damages only, unless he had extinguished the mortgage ; because, the mortgage was subject to removal by the grantor, as these notes were subject to payment by *Moore*.—*Prescott vs. Trueman*, 4 *Mass.* 630 ; *Delavergue vs. Norris*, 7 *Johns.* 358 ; *Hall vs. Deane*, 13 *Johns.* 105 ; 16 *Johns.* 122. There is no good objection to the recovery of this money under this count ; for it is a general rule, that when a person is compelled to pay money in consequence of a breach of contract by another, he may recover it back in an action for money paid.

*Bennett and Aiken, for defendant*.—The contract of *Moore*, offered in evidence by the plaintiff, is to have the same construction and operation as if the notes referred to had been actually recited in it at full length. Ingrafting into the contract the notes thus referred to, it will read thus : “Whereas, *Josiah Crofoot* has “executed his two certain notes with *Luther Park*, bearing date

" the 13th day of March 1818, running to William Rockwell, of BENNINGTON,  
 " Troy, each for six tons of good, merchantable, pulverized, yel- February,  
 " low ochre, valued at twenty five dollars per ton, to be deliver- 1831.  
 " ed at the store of said Rockwell, in Troy ; one of said notes Crofoot  
 " payable by the 20th day of May, 1818, and the other payable vs.  
 " in the month of June, 1818 ; I hereby agree to pay the said Moore.  
 " Crofoot's part of said notes, for which I have received a full  
 " consideration.—Bennington, 27th April, 1818."

" Darius Moore."

It is to be taken that the consideration, acknowledged by Moore to have been received, moved from Crofoot ; and that Crofoot's share of the notes was one equal half.

1. The plaintiff has in his first count declared on this as a contract of *indemnity* ;—and the first inquiry is, *has he not mistaken its legal effect ?* It is not, *expressly*, and on the face of it, a contract of indemnity ; but is a promise, for the benefit of Crofoot, to deliver to Rockwell six tons of good merchantable, pulverized, yellow ochre, by the 20th of May, 1818, and to deliver to said Rockwell six other tons of like ochre in the course of the month of June, 1818, at said Rockwell's store in Troy. This is an original contract between these parties,—to which Rockwell was an entire stranger, being a stranger to its consideration, and one on which he never could sustain an action. But, on the neglect of the defendant to deliver the ochre at the time and place stipulated in his contract, an action might, undoubtedly, have been sustained immediately, by Crofoot, to recover his damages. And, as to the amount of his damages, no doubt could be entertained ; for the contract itself gives the rule of damages—to wit, \$25, for every tone of ochre not delivered. A promise to indemnify would have enlarged his liability, and given a different rule of damages.—*Hayden vs. Cabot*, 17 *Mass. Rep*, 169. This enlarged liability he has not assumed, at any rate, by the *terms* of his contract. *Will the law superadd to this contract a clause of indemnity ?* Promises in law exist only where there are no express stipulations between the parties.—2 *T. R.* 105. This is so well settled, that it may well be called " an axiom in law."—6 *T. R.* 324. The law never raises a promise, unless the facts be such that justice requires there should be a promise. But, having made an express contract, the parties are bound by it, according to a fair construction of its terms ; and no rule of law or justice will warrant the addition of new and substantial provisions by implication. According to the plaintiff's construction of this contract, no action ac-

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crucied to him, till he was damnified by being compelled to pay the notes. According to our construction, an action accrued immediately, on the neglect of *Moore*, to recover all he could ever be entitled to recover, and the statute of limitations then attached. In this point of view, the cases of *Bishop vs. Little*, 3 *Greenl. R.* 405 ; *Battley vs. Faulkner*, 3 *B: and A.* 288 ; *Short vs. M'Carthy*, *id.* 626 ; *Bank of Utica vs. Childs*, 6 *Cowen*, 238, cited in *Balentine on Limitations*, 86, note 1, are strongly analogous to the present, and go to sustain the doctrine contended for by the defendant. *Crofoot* does not stand in the relation of surety for *Moore*, and the law of principal and surety does not apply. Between *Rockwell* and *Moore* no privity ever existed, and, on *Moore*, *Rockwell* never had any claim whatsoever. *Crofoot* still continued to be debtor to *Rockwell*—and *Moore*, by his contract, became debtor to *Crofoot*. Between principal and surety, a state of facts exists, independently of any contract, on which the law will raise a promise. Here no facts exist, on which a promise can be raised, but the special contract itself. But, if they did stand in that relation, *Crofoot*, having taken his special contract to secure himself, is bound by the provisions of that contract.—2 *T. R.* 100. Suppose *Crofoot* had compromised the debt with *Rockwell* at 50 cents on the dollar. Could *Moore* have claimed the benefit of the discount? In no point of view, therefore, is this a contract of indemnity, and of course the contract offered varied from that declared on.

2. The next inquiry is, whether this evidence is admissible under the *common counts*? It is here to be remarked, that the plaintiff does not claim, that the contract has been rescinded, and, on that ground, seek to recover back the consideration. But he treats it, as it is, an open, subsisting, unrescinded contract, and claims damages for the breach of it. He affirms it, and seeks to recover by virtue of it. It is further to be remarked, that no facts exist, independent of the special contract, which would entitle the plaintiff to recover at all ; but all his rights accrue from, and grow out of the special contract itself. The defendant does not controvert the doctrine, that *indebitatus assumpsit* will lie to recover a stipulated price, due upon a special contract, not under seal, where the contract has been completely performed, and a mere debt or duty thereby created ; or that the special contract, in such case might be given in evidence under the common counts to ascertain the amount of damages.—7 *Cranch*, 303. Nor does he controvert the right of a party to sue in that form, where the servi-



ces have been performed under a special contract, but not in ex-BENNINGTON, act pursuance of it.—*B. N. P.* 139. These doctrines are not ap- February, 1831.  
 plicable to the present case. But he does insist, that the plaintiff, Crofoot  
 having shown an open, subsisting, unrescinded contract, is not at vs.  
 liberty to abandon it, and resort to the common counts, *without show- Moore.*  
 ing such facts, as would have entitled him to recover in this form of  
 action, supposing no special contract had been made.—*Cook vs.*  
*Munstone*, 1 *N. R.* 351 ; *Keyes vs. Stone*, 5 *Mass. R.* 394 ;  
 14 *Johns. Rep.* 326 ; 18 *Johns.* 459 ; 2 *Phil. Ev.* 83, and note ;  
 2 *Stark. Ev.* 95, and notes. And as the plaintiff shows no facts,  
 which, independently of his special contract, would have entitled  
 him to recover, he must be confined to his special contract.

*The opinion of the Court was pronounced by*

THOMPSON, J.—The questions submitted, and now to be deci-  
 ded, are, whether the plaintiff's testimony was correctly excluded ;  
 1st. when offered in support of the special count of his declaration ;  
 and 2dly. when offered in support of the money counts.

The contract, offered in support of the declaration, is a direct  
 promise to pay the notes, and contains no indemnity in terms.  
 This was objected to, and excluded, on account of its variance  
 from the contract declared upon. The plaintiff has correctly  
 contended, that it is safe and proper to declare on a contract ac-  
 cording to its legal effect. And the question of variance, and the  
 question as to the statute of limitations, virtually resolve them-  
 selves into one; and that is, whether the contract, produced in  
 evidence, is an independent and absolute promise, or a mere un-  
 dertaking to indemnify and save harmless. If it is the latter, no  
 action could be maintained upon it, until the plaintiff suffered  
 damage by reason of the defendant's failure to perform ; and, in  
 that case, the statute could not commence running against the  
 claim, till such damage had accrued to the plaintiff. If it is an  
 absolute promise, an action would lie upon it as soon as the time  
 of payment had elapsed, and the statute would then commence  
 running.

The promise is not to pay a note, signed by the plaintiff as  
 surety for the defendant ; but it is to pay a specific sum for the  
 plaintiff to a third person, at a specified time ; and a full consider-  
 ation for this is acknowledged in the writing itself. In reference  
 to the matters now in controversy, we are not able to distinguish  
 this from a promise to pay the same amount directly to the plain-  
 tiff.

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A case has been supposed by the plaintiff's counsel: If the plaintiff had discharged the notes, by paying half their amount, could he recover the whole of the defendant? Undoubtedly he could. The defendant had received a full consideration for paying the whole which he promised to pay. If he failed to pay, the plaintiff ought to recover the whole amount of him. If the defendant paid and discharged the notes, and was able to do it with half the amount, that was his gain. It would have been a matter of no interest to the plaintiff. Just so the plaintiff's discharging the notes, by paying half or the whole, was a matter of no interest to the defendant. It would have been otherwise, had the contract been merely an indemnity. Indeed, we must first decide the contract to be a mere indemnity, or the supposed case can have no legitimate bearing in the argument.

From this construction of the contract, there was a variance; and the testimony was correctly excluded, when offered upon the special count. The same construction, also, shows the same testimony correctly excluded, when offered upon the money counts; for it matters not whether the plaintiff had paid the notes to Rockwell or not. If the defendant had not paid them, by the time specified, he was liable to this action of the plaintiff. And the ground of this action is the contract of defendant to pay Rockwell; and not the plaintiff's having paid him, after the defendant's neglect to fulfil his promise. Against this action, the statute of limitations, which is pleaded in bar, commenced running as soon as the defendant became liable to the suit of the plaintiff upon this contract.

The judgement of the county court is affirmed.



WINDSOR,  
February,  
1832.

### WILLIAM HAYES vs. AARON BLANCHARD, JUN.

A submission of an action to arbitrators, after an appeal therein, does not necessarily deprive the plaintiff of his right to enter his complaint for affirmance, unless there is an award made before court, or unless the terms of the submission allow a time, in which to make an award, which extends beyond the term of the court to which the appeal is taken.

The complainant in an *audita querela* will not be permitted to prove any cause for setting aside an execution or a judgement, other than such as are set up in his complaint.

This was a writ of *audita querela*, in which the complainant alleged, that said *Blanchard* brought an action of trespass against him, the said *Hayes*, for taking away a horse, which *Hayes* had

taken upon a writ as the property of one Cephas Blanchard ; that said action was brought before a justice of the peace, and tried ; and *Blanchard* recovered judgement against *Hayes* for the value of the horse. This was on the ninth day of March, 1830—That *Hayes* appealed from said judgement to the county court, then next to be holden in said county, on the last Tuesday of May then next—That, after said appeal, and before said term of the court, “in consideration that the complainant agreed that he would not enter his appeal at said term of the county court, *Blanchard* agreed with the complainant, to submit the action to the final arbitrament and award of Elijah Aikens and Jesse Gibbs.” And the complainant averred, “that, in consequence of said agreement, he did not enter said appeal, but he submitted said action to, and has ever since been ready and willing to abide the award of, said arbitrators in the premisses aforesaid ; but that *Blanchard*, in violation of his said agreement, and without the knowledge or consent of the complainant, entered said action at the said term of the county court, and procured the affirmance of said judgement, and took out a writ of execution upon the same, with additional costs,” &c. The complaint then stated the taking out execution and arresting the body of the complainant upon it.

The defendant pleaded the *general issue*, not guilty, with a notice that he should give special matter in evidence. The complainant’s testimony tended to prove, that on the tenth of March, the next day after the said action was appealed, the parties submitted the action to the arbitrament and award of Elijah Aikens and Jesse Gibbs, generally, by parol, without any time specified, in which an award was to be made, or published, with full powers for said arbitrators to decide between the parties, with a view to a final settlement of the suit ;—that the arbitrators and parties forthwith met at the house of said Aikens to attend to said business ;—that *Blanchard* presented his claim for the horse, and, after a full hearing upon this claim, the arbitrators made and published their parol award, that *Hayes* should deliver back, and *Blanchard* should receive, said horse ;—that a further question was then raised, and submitted to said arbitrators for their decision, what damages, if any, *Hayes* should pay to said *Blanchard* for the detention of the horse ? and that on this point the arbitrators reported, that they were unable to agree ;—that the parties then talked of agreeing upon a third man, but failed to agree ;—that the parties separated, and went to the middle of the town, about one mile, where there were courts held that day. It appeared in ev-

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idence that no other award was made than as above. Defendant then introduced evidence, which went to the jury without objection, tending to show, that, just as the parties left Aikens' for the middle of the town, *Hayes* said to *Blanchard*, "I shall send back the horse";—that *Blanchard* replied, "if you do, I sha'nt take him. I had rather let it trundle." Plaintiff then offered one Lyman Stewart to prove that, either whilst the parties were going from Aikens' to the middle of the town, or after having arrived there, and within one hour after they left Aikens', the parties concluded to comply with the award, so far as made, to wit, "that *Blanchard* should take back the horse;" and by mutual agreement completed what was left unfinished by the award of the arbitrators, and agreed that *Hayes* should send, and *Blanchard* take back, the horse pursuant to the award of the arbitrators, and that the suit should be considered settled;—that *Blanchard* should claim nothing for detention, nor *Hayes* for keeping;—that the horse was sent back by *Hayes*, and received by *Blanchard*, accordingly, on the same tenth day of March. To all which testimony the defendant's counsel objected, and the court excluded it from going to the jury.

The plaintiff's counsel requested the court to charge the jury, that, if they should believe the parties made a general parol submission of the suit, as alleged in the complaint, without a day fixed by the parties, within which said arbitrators were to publish an award, and that defendant, *Blanchard*, entered said appeal as alleged, plaintiff was entitled to recover, unless defendant had shown to the jury an express revocation of said submission, or notice to the opposite party, that the appeal would be entered in the county court, before it was in fact entered. But the court instructed the jury, that, unless there was a submission by bond with a penalty, or in some way so formed as expressly to secure its going past court, plaintiff was not entitled to recover, unless he had both alleged in his complaint, and proved on trial, as well a submission as an award under said submission, which of itself would put an end to the suit; that the plaintiff in this complaint, under such a parol submission, was not entitled to any notice from defendant of his intention, before entering said appeal for affirmance; but that the plaintiff was bound to see to it, that an award was made by said arbitrators; and, without it, this defendant was justified in entering his appeal without notice to plaintiff. A verdict was returned for the defendant. The plaintiff filed exceptions, and removed the case to this Court, and prayed for a new trial.

*E. Hutchinson, for the plaintiff*, contended, That when judgement is obtained before a justice of the peace, and an appeal is taken, and, before court, the suit is mutually agreed by the parties to be submitted to the final arbitrament and award of men agreed upon, that the action is *thereby, ipso facto*, out of court, until a revocation; and that either party is entitled to notice before the action is entered by the other: and this, whether the submission be by *parol*, or otherwise; and cited, 1 *Swift's Dig.* 473, 464, 467; *Mott vs. M'Neil*, 1 *Aik. Rep.* 162; *Mason vs. Silver*, *Id.* 367; *Eddy vs. Cockran*, *Id.* 359. He also contended that a new trial should be granted for the exclusion of Stewart's testimony offered by the plaintiff; and cited *Hubbard vs. Wheeler*, 2 *Aik. Rep.* 364; *Collier vs. Moulton*, 7 *Johns. Rep.* 109.

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*Mr. Collamer*, was heard in reply.

HUTCHINSON, C. J., after alluding to the principal facts in the exceptions, pronounced the opinion of the Court.—The principal question in this case is, whether the action was so ended by the submission to arbitrators, and their proceedings, that *Blanchard* had no right to enter his complaint for affirmance. The submission described does not carry the case by the court, to which the appeal was taken. There is no time set for the award to be made, nor any security to *Blanchard* for the recovery and collection of his demand, if there was no award before court, nor any judgement in court. The parties and arbitrators were together forthwith after the submission was agreed upon; and all the arbitrators did was done the same day; and they all separated, with no apparent intention of ever convening again upon the subject. Thus it rested till court, which was over two months and a half. That part of the complaint is not proved, which states *Hayes'* promise not to enter the appeal. For aught that appears in the case, his right to enter the appeal was unembarrassed, unless there should be an award upon the whole merits before the time of the court's sitting. It is not even contended, that the award, so far as made and published, covered the whole ground and put an end to the suit: and nothing appears that either party was in fault, more than the other, on the subject of the failure to settle the suit by award. Under all these circumstances, the Court are of opinion, that, in order to take away the right of either party to enter the action in the county court, there must have been both a sub-

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mission and award, wholly settling the controversy ; or else there must have been a submission on such terms as gave the arbitrators a time in which to make their award, extending by the county court to which the appeal was taken. Neither of these can be inferred from any testimony in the case. Indeed, considering how soon after the appeal the arbitration was agreed upon and holden, and how long and quietly it rested from that event till court, the most natural inference is, that both parties considered the arbitration at an end.

Another question arises upon the exclusion, by the county court, of the evidence offered to prove a settlement by the parties, affirming the award so far as made, and closing the rest by their mutual agreement. This appears to the Court to be an entire new ground for setting aside the judgement and execution, which is not named in the complaint : and, if it be a tenable ground, it ought to have been stated in the complaint, so that the defendant might come prepared to answer it. This ground is as variant from that set up in the complaint, as any one contract is variant from another. But it is said this special matter comes in to rebut the matter of the special notice of the defendant. We think, however, that the special notice has had no effect to render this testimony admissible. The matter of this special notice was nothing but what the complainant needed to prove on his part, except, that the agreement of submission was, that the award should be made within two days from the time of the submission ; and the defendant introduced no testimony tending to prove this. It appears, that the trial proceeded just as if this notice had not been filed.

We discover no error in the judgement of the county court, and the same is affirmed.

## THE STATE TREASURER vs. JOSEPH WEEKS.

WINDSOR,  
February,  
1822.

The statute of limitations does not run against the state, unless named in direct terms.

A declaration, alleging a tax granted by the *legislature* is well enough; that term being used in some sections of the constitution.

When a sheriff has neglected to execute two extents against different constables, the State treasurer may issue one extent against such sheriff for both neglects.

A declaration, alleging, that the treasurer issued his extent in due form of law, bearing date, &c., is sufficient, without averring it to be signed by him; the objection not being taken by special demurrer.

When a sheriff, who has neglected to execute an extent, is out of office, the extent against him may be directed to, and served by, the sheriff, who is in office at the time, and need not be directed to the high bailiff.

In an action on the case against a sheriff for an escape, such sheriff has a right, at common law, to show the property of the prisoner at the time of the escape, in mitigation of damages.

This was an action on the *case*, brought against the defendant as sheriff of the county of Franklin, to recover damages for his suffering one Shiveric Holmes, a former sheriff, to escape, when in prison on an extent for taxes, issued by said treasurer. The declaration set forth two taxes, assessed in two different years, alleging them to have been assessed by the *legislature*. It also set up a claim against Holmes for neglecting to collect of John H. Burton, constable of St. Albans, an extent against him for a portion of one of said taxes; and a claim for not executing an extent against Amos Town, first constable of Bakersfield, for a portion of said other tax—That the extent against Holmes was given out after he was out of office, to wit, on the 13th day of April, 1822, and was delivered to said *Weeks*, who was then sheriff of said county, and was directed to the sheriff, and not to the high bailiff; and that the defendant on the twelfth day of June, A. D. 1822, committed Holmes to prison by virtue of said extent, and forthwith suffered him to escape from said prison. This suit was commenced at June term, 1831, almost eight years after the escape. The defendant pleaded the general issue in the county court, and also the statute of limitations of six years. To this last plea there was a demurrer; and the plea was adjudged to be bad. On the trial of the general issue, the defendant offered to prove the poverty and total insolvency of Holmes, at the time of the escape, in mitigation of damages; and relied upon the statute relating to jails and jailors, &c., as giving this right to the sheriff. This testimony was objected to by the plaintiff's counsel, and was rejected by the court. The plaintiff obtained a verdict; and the



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defendant filed exceptions to these decisions, and the cause was ordered to pass to this Court for a revision. And now, at this term, it was argued by counsel.

*Mr. Collamer, for the defendant.*—I. The first question in this case is, can the statute of limitations be pleaded to a suit, brought in behalf of the state treasurer? The plea is attempted to be put down on the ancient maxim, *nullum tempus occurrit regi*. In answer to which, it is contended, for the defendant, 1st. That this maxim in behalf of the crown was a personal one for security of rights and lands, and not a part of the prerogative as representative of the national sovereignty. 2nd. That, in England, the king is part of the supreme power, and not to be legislated out of his rights by a parliament to which he is not subject. In this state the treasurer and his claims are subordinate and inferior, and subjects of the legislature. 3rd. That the maxim is part of the *common law* as a system, and merely qualifies the maxims of that law, and applies not to a statute made in derogation of that common law, including this maxim. 4th. That the maxim cannot apply in this country, in many cases, is apparent, as in cases of *qui tam* prosecutions and crimes. 5th. That the legislature having made a statute broad enough in its words to include the case, and having excepted the state in relation to lands, and nothing more, it is to be taken, that they intended the state should, in other cases, have no privileges but such as were reserved to individuals; and the Court ought not afterwards by judicial legislation to interpolate another proviso on the statute.—7 *Dane*, 427. 6th. All the grounds, on which the policy of the statute is supposed to rest, apply equally to the state; that is, presumption of payment, loss of testimony, &c. 7th. The state has thought proper to secure itself against the effect of delay in another manner, for treasury claims, of which this is one. The treasurer is directed to proceed in a certain manner, and by a certain time, and is made chargeable on failure. This is to be presumed as so done, and, therefore, to be considered as the private claim of B. Swan, to which the statute applies as to any other man.

II. But, if this plea be insufficient, being demurred to, the next enquiry is, how is the declaration? as the demurrer attaches to the *first* fault. The defendant insists, that this declaration is insufficient for the following causes: 1st. The declaration states that the *legislature* granted a tax; when there is no such body in the state. 2nd. The treasurer joined two distinct delinquencies

of taxes of different years, and against different constables, as committed by sheriff Holmes, in the same extent against him. 3d. It does not say the extent against Holmes was signed. 4th. It says, that, by virtue of a certain statute, he issued this extent and directed it to the sheriff of Franklin county, &c. Now, that statute does not authorize him so to issue and direct; but it must issue to the high bailiff; and states what he shall suffer for neglect. This authority of the treasurer, being in derogation of the common law right, is to be strictly construed and pursued; and, if Holmes was unlawfully imprisoned, this action for escape can not be sustained.

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III. There was, however, claimed for the plaintiff, on the trial of the general issue, a still more extraordinary exception from the statute; that is, an exception from the statute, which permits a sheriff, when sued for an escape, to prove the insolvency of the prisoner and the circumstances of the escape in mitigation of damages. 1st. This is attempted to be sustained on the ground, that the statute containing it does not provide for treasury collections; when, at the same time, it is the very statute on which *this suit* is founded; for the one regulating collections in the treasury department would never have authorized a commitment, by a sheriff, of a former sheriff. 2nd. There is no exception for the treasurer in the statute, and there is no reason for it. It cannot be claimed on the ground of exemption from the statute of limitations, which is, that no *laches* are to be imputed to the government. 3rd. All the reasons of the law apply to the treasurer. The only legitimate object of imprisonment for debt is, to enforce a disclosure, and rendering up of property actually possessed by the prisoner. If he has none, imprisonment is wrong, and the state or its treasurer have no right to convert the law into an engine of oppression, and render imprisonment for debt a punishment. 4th. It may perhaps be said, that this was not a bailable claim; but the statute makes no such distinction, as has been fully settled; and, indeed, the very reason that it was not bailable, constitutes a cause for protecting the sheriff in the exercise of his humanity.—*Brayton's Rep. 37, Wait vs. Dana; 1 Vt. Rep. 423, Middlebury vs. Haight.* 5th. It may, perhaps, be said the escape was *voluntary*. But to this the same answer may be made, and the same decision cited, as last quoted. 6th. The privilege of the sheriff, to give in evidence the insolvency of the prisoner and the circumstances of the escape in mitigation of damages, exists at *common law*: for the right to recover the whole debt exists only when

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*debt* is brought for escape, [on the statute of Westminster 2nd ; and, therefore, our statute is merely declaratory and unnecessary ; and, consequently immaterial, whether it extends to the treasurer or not.—2 *Dane*, 653, 647, 648.

*Mr. Marsh, for the plaintiff.*—The general questions arising in the pleadings, are, *first*, Whether the statutes of limitation run against claims in favor of the state, it not being expressly named. *Second*, Whether the statute authorizing the sheriff, in an action for an escape, to give the situation and circumstances of the prisoner in evidence in mitigation of damages, applies to judgements and commitments in favor of the state. If the Court is of opinion with the defendant, on the first point, judgement must be for him. If the opinion of the Court is for defendant in the second point *only*, a new trial will be granted ; otherwise, judgement will be entered on the verdict.

1. It has been established as a rule, that all prerogatives must be for the good of the people ; otherwise, they ought not to be allowed by law.—1 *Show.* 75 ; 5 *Bac. abr.* 487. Prerogative includes all the rights and privileges the king—the government—have, as head or chief of the commonwealth. Prerogative seems to be a right, or privilege, which the crown, or government, claims and exercises for the common good. One of those prerogatives is, that generally the crown, or government, is not bound by statutes, unless particularly named.—11 *Co.* 68. To this, however, there is some restriction ; and it is laid down, that when an act of parliament is made for the public good, the advancement of religion and justice, or to prevent injury and wrong, the king is bound by the act, though not particularly named.—5 *Bac. abr.* 559. But, where it is general, and thereby any prerogative right, title or interest, is divested or taken from the king, in such case he is not bound, unless the statute is made by express words to extend to him ; and where the king's right is expressly saved, it is *ex abundanti cautela* : accordingly the king is not bound by statutes of limitations.—*Id.* 561, 562. *Vigilantibus non dormientibus jura subveniunt*, is a rule for the subject : but *nullum tempus occurrit regi*, is the king's plea ; for there is no reason, that he should suffer by the negligence of his officers, or by their contracts or combinations with the adverse party.—*Hard.* 24. It is believed that all the prerogatives and rights, &c., of the king of England, belong to the government of this country, in all cases where they are applicable, and can be exercised for the good of community ; and

this maxim, it was said by *Mr. Justice Story*, in the *U. S. vs. Kirkpatrick*, 9 *Wheat.* 735, is founded not on any extravagant notions of prerogative, but upon great public policy. This applies particularly to the principle, that the government is not bound by statutes of limitations. If the statute is ever permitted to run, it must be through the negligence or connivance of some of the officers of government, by which the government ought not to be bound : and if no *laches* can be imputed directly to the government itself, surely the mere *laches* of its agents ought not to be imputed to their principal. It is clear that, in Great Britain, the king, in other words, the government, is not bound by the statutes of limitations, and the same reason will apply here, both to the state and to the United States, as remarked by *Judge Story*, in the case above cited.—5 *Bac. abr.* 561. The general principle is, that *laches* is not to be imputed to the government ; and this maxim is founded not in the notion of an extraordinary prerogative, but upon great public policy. The government can transact its business only through agents, and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of *laches* can be applied to its transactions. This applies as well to such *laches* as are so long continued as that the statute will have run, as to others ; and there is not the same reason for applying the statute to the public, as to private demands. There is not the same presumption of payment. Presumptions of payment do not arise in case of the government, where all payments are placed on the records, which must be kept by the officers of government.—1 *Pet. Rep.* 326 ; 2 *U. S. Stat.* 70, 34 ; 3 *Pet. Rep.* 29, 277. No decisions can be found of the United States courts, because the U. S. have no general statutes of limitations, which would be likely to affect their own claim ; but the subject is left to the operation of the state laws ; and no case can be found, in which it is decided, that the state is not bound by its own statute of limitations. Nor can any case be found in which it has been decided that the state was within the statute of limitations. The conclusion must be, either that no one thought of setting up such pretence, or that the states generally have excepted themselves out of the operation of their own statutes of limitations. And if so, it was not probably supposed they would be bound without such exceptions ; but such provision was inserted *ex abundanti cautela*.—5 *Bac. abr.* 559. Will it be contended that *squatters* on the lands belonging to the

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state, can hold by fifteen years' possession. Congress often pass acts, giving the right of preemption to actual possessions ; but no one ever thought they could hold against the U. S. by possession. There is now a bill before congress, to indemnify a man who had been in possession thirty or forty years, and cleared up nearly all his land, and who was likely to be turned off by running anew the lines between certain Indian reservations ; and the committee who have reported in his favour never once thought of telling him to hold by possession, by way of indemnity. In the case, *U. S. vs. Buford*, it is expressly laid down, that, to any action for money had and received, in the name of the United States, the statute of limitations would be no bar.—3 *Pet. Rep.* 29. Our statute adopts the common law of England in cases where it applies. The common law is, that the king—the government—is not bound by statutes generally, unless named, and especially by the statute of limitations ; and no reason is perceived why this part of the common law does not apply to our own government.

2. The *second* point, whether the defendant should have been admitted to show that the prisoner, Holmes, whom he permitted to escape, was insolvent at the time of his commitment, and so the plaintiff entitled to recover nominal damages only, we think equally clear. It is abundantly evident that the statute was framed, and intended, to regulate the proceedings of private individuals only, and that it never was intended to extend to the state. It will be observed that the same statute makes provision for poor debtors swearing out of jail. But the legislature has thought fit, by a special exception in the 15th section, to say, *that no person shall be admitted to the oath, who shall be imprisoned on a demand in behalf of the state.*—*Stat.* 220, sec. 12 ; 223, sec. 15. And to provide another board in *Stat.* no. 15, on the same subject, for state debtors to arrive at the same privilege.—*Stat.* 234. Now it is incredible, that the legislature should use all this caution with respect to admitting state debtors to the oath, and yet permit the sheriff to discharge them at his discretion, and be responsible for nominal damages only. For it has been decided, that this provision extends to voluntary as well as negligent escapes. The legislature has always exerted the utmost vigilance in its care of the public monies ; and it cannot be supposed, that it ever was intended to put the debts due the state, at the mercy of the sheriff, or the arbitrary discretion of a jury in assessing damages for an escape. The whole of these statutes, for they all make but one system, though thirty in number, all treat of suits,

judgements, executions, notices and other proceedings, between common and individual debtors and creditors, and surely were never intended to extend any further. No. 7, for instance, provides for tendering real and other property by a debtor, while in jail, to his creditor ; directs the mode of appointing appraisers, &c. &c., and the words are general, and, literally understood, would embrace debtors owing the state. But can it be admitted for a moment, that the legislature intended to subject the officers of state to the vexation of attending to such business, and the state to the loss, which must be the necessary consequence. Surely it will be more safe to believe, and to adopt the construction, that, when the legislature mean to tie their own hands, they will say so in terms, and that when the state is not named, or from the nature of the case, necessarily included in a general act, that it is not affected by its provisions. If there are cases in which statutes, concluding in general terms, without naming the state, do bind the state, it must be in cases only, where the public good requires that it should be so, and is not to be admitted as a general rule. No reason can be assigned why state debtors, who happen to be committed, should be permitted to escape, and thus avoid their debts, while all others must apply for redress to the legislature. The legislature, in relation to state debtors, has always holden the staff in their own hands, to enforce their claims or to discharge them at pleasure, whether they were rich or poor ; and no relief, be the hardship what it might, has been supposed to exist, but by application of their clemency.

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HUTCHINSON, C. J., *pronounced the opinion of the Court.*—The plea of the statute of limitations, to which the plaintiff demurred, was overruled by the county court. The demand appeared to have lain sufficiently long to be barred, if comprised within the statute. But we consider the statute barring civil actions, applicable *only* to suits between individuals. The state is not named as being bound by it. The sections, which provide a bar to prosecutions for crimes, are made to bar the state, because the state is prosecutor. Certain *qui tam* actions are barred by the first section of the statute, when sued by a common informer, to a given period ; and a longer time is given to the state, when no person appears to prosecute. This is all plain ; and it appears reasonable to conclude, that the law makers, thus definite in so many cases, did not intend to include the state and bar their rights, in cases not named at all ; especially, when it must have been

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well understood at the time of making this statute, what construction the English courts put upon statutes of similar import.

There having been a demurrer to this plea of the statute of limitations, the defendant's counsel have gone back to the declaration, and urged several objections to its validity. 1st. That the law making power is therein termed, the *legislature*. This term is frequently used in common parlance, and once, if not more, in the constitution, to designate that body. We think this no good objection to the declaration. 2nd. The declaration sets forth an extent against Holmes for two distinct delinquencies, occurring in two different years. This objection is fortified by presenting the difficulties that would arise in casting the burthen upon the right persons among Holmes' bail, had the remedy been sought of them in any event. This, it is urged, rendered the extent against Holmes void, and his imprisonment illegal. But we find, on inspection of the declaration, that it describes the sum due from each constable with such particularity, that no more difficulty could arise, in the apportionment among bail, than if a suit were brought with two counts, in which the sheriff ought to be made good by different deputies. The true sum could be ascertained as easily as in any other cases of apportionment. 3rd. It is objected, that the declaration does not allege, that the extent was signed. This is not inserted with entire particularity. The averment is, that the treasurer, on such a day, &c., "issued his extent in due form of law, dated, &c." This is not sufficiently defective to be adjudged bad, unless on special demurrer. The defendant's fourth objection to the declaration is, that it describes the extent against Holmes as having been directed and delivered to the defendant, as sheriff, when, by the statute, it ought to have been directed to the high bailiff, and delivered to him to serve. It is contended, that a precept, thus misdirected, gave the defendant no authority to hold Holmes a prisoner. The general statutes provide, that all precepts shall be directed to the sheriff or his deputy, &c. ; and wherever the sheriff is interested, or is a party to the suit, the precept shall be directed to the high bailiff. And, when the sheriff shall be in prison the high bailiff shall be keeper of the prison. The statute, regulating the treasury department, directs the treasurer to issue his extents against constables, and direct and deliver them to the sheriff ; and, when the sheriff has committed a neglect, and an extent issues against him, the treasurer shall direct and deliver that extent to the high bailiff ; and fixes a penalty upon the high bailiff if he neglects his duty in the



case. The letter of this last statute would seem to support this objection: but we perceive by the declaration that Holmes, though he was liable to an extent for a default committed while he was sheriff, yet he had ceased to be sheriff at the time when the extent issued against him. In all such cases, the object of the general laws can only be answered, by directing precepts to the sheriff, who is in office, against the man, who had before held the office. Otherwise, the sheriff and high bailiff might each become keeper in chief of the prison, when the bailiff should commit the former sheriff. This would present an absurdity, and a direct contradiction to that part of the statute, which makes the acting sheriff keeper of the jail unless he is himself in prison. The uniform and necessary practice has always been, to direct to the sheriff all writs against his predecessor. The peculiar expressions of this statute in the treasury department, are applicable to the cases where the sheriff, who neglects his duty, and becomes liable to an extent, remains sheriff when the extent issues against him. When a different case occurs, the general statutes may be applied to it. Such is the present case. The defendant was sheriff, and uninterested, when the extent came against Holmes, who was not sheriff, for an neglect of duty while he was sheriff. This objection is overruled

There yet remains a question, raised on the exception to the exclusion of evidence, offered by the defendant, to show the poverty of Holmes when he escaped. We consider the statute, giving this privilege to the sheriff, applies only to individual suitors, and not to the state. All the provisions for the privilege of the poor debtor's oath; the notice to the creditor, or his attorney, if living within the county; the necessity of the creditor's appointing an agent in the county when he resides out of it; the legislature's making a separate provision for debtors to the state; these all indicate, that the provisions, now claimed under the statute, were not intended to affect the state; that the state was not thought of at all in this enactment. But this right of showing the poverty of the prisoner is a common law right. The state or any other suitor, bringing an action upon the case, complains of an injury, and claims reasonable damages. And the defendant, in all such actions, has a right to prove what will convince, that the plaintiff has sustained less damages than he asks for. In the present case, the plaintiff demands the whole sum, for which Holmes was imprisoned; because he could not have been liberated from his imprisonment until he paid it. This hold upon him is lost by the

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escape. The defendant says, the plaintiff's right thus to hold his debtor in prison, was worth but little or nothing; for he was so destitute of property that he could have paid nothing, had he continued in prison during life. This testimony ought to have been admitted, upon common law principles, and the plaintiff might show, in his turn, that Holmes was not thus destitute of property: then the jury might have given the plaintiff such damages, as he had sustained by reason of the escape. Because this testimony was excluded by the county court, their judgement is reversed, and

A new trial is granted.



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THE TOWN OF BROOKLINE vs. THE TOWN OF WESTMINSTER.

*Assumpsit* lies by a town, erecting a bridge under an order of court made on their petition, against any town, assessed by such order, in a portion of the expense of erecting such bridge.

Notice of the expenditure in erecting such bridge should be given, not to the town clerk, but to the select men, and payment be demanded of them.

The order of the county court, for erecting a bridge and apportioning the expense upon several towns, is conclusive upon the towns, cited before them on the petition, if the case is within their jurisdiction, and their order within the powers given them by statute.

For the purpose of such jurisdiction, a river is to be considered as running between two towns, both when it is literally so, one bounding on each side, and when both are bounded together upon one side, and when neither can erect the bridge without extending it into the other town.

This action was brought up from the county court upon the following bill of exceptions:

"This was an action of *assumpsit*, brought by the town of *Brookline*, to recover of the defendant town the expense of erecting a certain bridge across West river, on the road from Newfane Court house to the former residence of one Ormsbee, in *Brookline*. The defendants pleaded the *general issue*, and the declaration and pleadings are referred to as part of the case. The plaintiffs offered in evidence, to support the issue on their part, attested copies of the records and proceedings of Windham county court, marked A, which are made a part of the case. To the admission of which the defendants objected; but the objection was overruled by the court, and the testimony admitted. These records showed the order of the county court for the erection of said bridge. The plaintiff also offered parol testimony tending to prove the erection of the bridge by, and at the expense of, the town of *Brookline* before the bringing of this action: to which the defendants objected, on the ground, that the proceedings of the town of

*Brookline* ought to be proved by their records : but this objection was overruled and the testimony admitted. The plaintiffs then gave in evidence testimony, tending to prove, that the expense of erecting and completing the bridge amounted to \$1683,05 ; and also proved, that the items of expense were ascertained, and a bill of particulars made out, as early as the month of April, 1828. He also gave in evidence parol testimony, tending to prove, that before the commencement of this action, their agent made inquiry at *Westminster* of respectable inhabitants of said town, and learning from them that E. T. Cone was first select man of said town, and had acted as such, and also being told the same thing by Cone himself, delivered to said Cone the paper marked B, and demanded of him payment of the sum therein stated, as the portion of said town of the expense of building the bridge. To which testimony the defendants objected, on the ground, that the fact of said Cone's being select man ought to be proved by the record ; and that the select men were not proper persons to whom to deliver notice, and that a copy of the items, or a bill of particulars, ought to have been furnished said town. All which objections were overruled by the court, and the testimony went to the jury. The defendants also contended, and prayed the court so to instruct the jury, that the plaintiffs, in support of their issue, ought to prove that West-River ran between two towns ; that there was a road crossing the same, at the place of location of said bridge, at the time of location thereof. But the court refused so to do, and decided that all questions, relating to the proceedings contained in the paper marked A, must be considered as proved thereby, until the said proceedings were reversed by some court of competent jurisdiction. The defendants then offered testimony, tending to prove, that the said river did not run between two towns, and that there was no road at the place of location of said bridge : which testimony was objected to by the plaintiffs, and, for the reason just stated, rejected by the court ; and a verdict passed for the plaintiffs, under the charge of the court, to recover the amount demanded in said paper marked B, and interest thereon from the time of said demand. To which charge and decisions the defendants excepted."

" And now, after verdict, and before judgement, the defendants move, that the judgement on said verdict be arrested, because they say that the plaintiffs' declaration is insufficient, and that the matters and things therein contained are not sufficient in law, whereby judgement can be duly rendered on the same.

By *Bradley*, their att'y and agent."

The motion in arrest being overruled, the defendants excepted to the decision overruling the same, and prayed that the case might be carried up to the Supreme Court ; which was ordered accordingly.

The declaration and papers marked A and B are sufficiently described in the opinion of the Court, and need not be recited here.

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*Mr. Bradley, for the defendants.*—In this case the defendants contend, that the proceedings, on which the action is founded, being those of a special and circumscribed jurisdiction, and not according to the course of the common law, are to be taken strictly; and, if sufficient does not appear to have been averred to bring them within the jurisdiction of the committee, or county court, they shall be intended to be without that jurisdiction.—3 *Salk.* 216; *Cowp.* 528, *Hartly vs. Hooker*; 2 *Wils.* 16, *Waldeck vs. Cooper*; 6 *Mod.* 224; 7 *Ib.* 103, *Reignol vs. Taylor*; 1 *Saund.* 73; 5 *Mod.* 78, *Cudmore vs. Tripe*; 4 *Cranch*, 93; 5 *Ib.* 173. And it is no argument to say, that the statute of 1797 makes the proceedings conclusive, none being intended thereby, but such as appear on their face to be conformable to the statute.

In this instance two things were, by that statute, [which was made for the relief of the towns bounded on Onion River at the banks respectively, and leaving the river between them] necessary to give the jurisdiction: 1. That the river should be between two towns. 2. That the bridge should be upon a road crossing it at the time. And both these facts have been averred and proved. Whereas, in the present case, no fact appears of any road, at the time, where the bridge was located, nor does it appear, that the river was between two towns: for the statement, that “the river was the boundary line of two towns,” does not necessarily, or even probably, imply, that the river itself, or any part of it, lay, or ran, between two towns, as a mutual boundary at one edge of the river, leaving the whole river in one town, would satisfy this expression. That such was actually the case, appears by the statute of 1820, *chap.* 33, *p.* 41, annexing a part of Newfane to the town of *Brookline*; and this being not only published as a public act, but the laws establishing the boundaries of towns and counties being, in themselves, public acts, the court is bound to take notice of it.—10 *Mass. Rep.* 91. And, if there was any doubt on this subject, the defendants offered to remove it, by proving, that such was the state of the river and the road; that both the facts were with the defendants. It is contended, then, that, on one or the other ground, the motion in arrest, or the one for the rejection of the proceedings, ought to have prevailed: and it is submitted, whether, in cases of this kind, such copies can be admitted, no provision being made therefor; and also, whether the original proceedings ought not to have been produced. The order made was for the payment of the several proportions to the

town of *Brookline*; and the plaintiffs were permitted to show, by ~~their~~ *parol* testimony, that the bridge was built by the town of *Brookline*, and at the expense of that town, without notice or application for building to the other towns; whereas some proceedings of that town in relation to said bridge ought to have been shown by the books or records of the town.—7 *Mass. Rep.* 102; 8 *Id.* 292; 10 *Id.* 397. Be this as it may, it is apparent, that *Brookline* could claim nothing, by suit, of *Westminster*, until notice of the expense and demand of payment. And it is to be inquired what such notice and demand ought to be? The defendants contend, that it ought to be in writing, (6 *Mass. Rep.* 501;) to be so specific and particular, that the defendants might know for what the claim was made, and might have the means, by knowing the items, of judging of its fairness; because, as to so much, as they claim of the defendants, the plaintiffs must have considered themselves acting as the agents of the defendants; and that it, also, ought to have been made in the proper way, which, it is contended, is, by leaving it with the town clerk: but that, if it could have been left with a selectman, it was incumbent on plaintiffs to prove him such on trial by the evidence the circumstances would admit, which was not done. It is also submitted how far assumpsit is the proper remedy.

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*Mr. Kellogg, for the plaintiffs.*—I. It is objected by the defendants, that the court erred in admitting *parol testimony* to prove the erection of the bridge by, and at the expense of, the town of *Brookline*.

1. The erection of the bridge could be proved only by *parol*. The doings of the agents, or persons employed in the building of the bridge, could be proved only by *parol*. They are not the proper subjects of record, and, consequently, if their proceedings and expenditures were entered upon the records, copies would not be competent evidence to prove the same in court. The only fact, then, which could be legally proved by the records, is the appointment of the agents or committee to superintend the building of the bridge. But can this be material? The only liability, upon the defendant town, is by force of the judgement of the county court, establishing the bridge, and settling the proportion of the expense to be born by the respective towns. The liability under that judgement is, to pay to the town of *Brookline* four twentieths of the expense of building; and there is no liability to any other town. The bridge is erected; and it is not pretended, that any

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part of the expense was borne by *Westminster*. 2. But if the Court should be of opinion, that the fact of the appointment of a committee should be proved by the records, still, if they are now satisfied that the fact exists, and that it is an uncontroverted fact, and that opening the trial for this reason would avail the party nothing, will they grant a new trial?

II. It is insisted by the defendant, that the plaintiff should have proved by the records, that E. T. Cone, to whom the bill of expenditures was delivered, and of whom payment was demanded, was a select man of *Westminster*; and further, that the select men are not the proper persons, to whom the notice should have been delivered.

1. Cone declaring himself one of the select men, and acting as such, and being recognised by the people of *Westminster* as such, is sufficient evidence of the fact, so far as the public are concerned.—3 *Johns. Rep.* 426; *Cowen's Justice*, 572; 2 *Camp. R.* 131; 12 *Johns. Rep.* 296; 3 *Camp.* 433. 2. The select men are the proper persons, to whom the notice should be given. They have, by statute, the general management of the affairs of the towns, and particularly all the prudential concerns. To whom could notice with more propriety be given? In all matters relating to the poor, the statute requires notice to the overseers of the poor: and why? Because the statute has assigned to them that branch of business. All duties and business devolving upon towns, and not particularly assigned to others, it is believed, devolve upon the select men as the general agents and guardians of the town. 3. But it is believed that no notice in this case, prior to the commencement of the suit, was necessary, the statute not requiring any.—1 *Chitty*, 320.

III. It is insisted by the defendants, that the plaintiffs ought to have proved, that West-River ran between two towns, and that there was a road crossing the same at the location of said bridge.

1. Those facts were settled by the judgement establishing the bridge; and the facts thus found and established cannot be controverted in this collateral way. 2. The judgement has never been reversed; and every fact found by the judgement, is conclusive upon the parties, while it remains in force. 3. The judgement of a court of competent jurisdiction cannot be collaterally impeached; it must be set aside either by an appeal, writ of error, or petition for a new trial.—6 *Wheat. Rep.* 109; 2 *Gall. Rep.* 216; 13 *Johns. Rep.* 141, *Hoyt vs. Gelston*; 4 *Day*, 221, *Goadrich vs. Thompson*; 1 *do.* 170, *Bush vs. Sheldon*; 2 *do.*

306, *Rockwell vs. Sheldon*; 1 *Con. Rep.* 7, *Canaan vs. Greenwood Turnpike Co.*; *Peak's Rep.* 59; 1 *Salk.* 290; 3 *Salk.* 492.

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As to the motion in arrest—all defects, which can only be taken advantage of by special demurrer, are cured by verdict.—1 *Sw. Dig.* 776. If it appears from the declaration, that the plaintiff has a cause of action, but has set it forth in a defective manner, it will be aided by verdict.—1 *Term. Rep.* 145; 1 *Sw. Dig. ut supra.*

HUTCHINSON, C. J., pronounced the opinion of the Court, as follows :—This is an action of *assumpsit*, brought to recover four twentieths of the monies, expended by the town of *Brookline*, in erecting a bridge across West-River, between *Brookline* and New-Fane. The plaintiffs set forth in their declaration, the particulars of their proceedings before the county court, which, they contend, entitled them to recover. They declare, that the inhabitants of said town of *Brookline* had petitioned the county court, by petition in writing, &c., and stating therein, that there was a public road leading from the county buildings in said New-Fane, across West-River, at or near the fording place, known by the name of Flint's fording, to the dwelling house of Benjamin Ormsbee, in said *Brookline*; and that the said West-River, where the said public road crosses the same, is the boundary line between the said town of *Brookline*, and New-Fane; and that it was necessary, not only for the convenience and accommodation of the said towns of *Brookline* and New-Fane, but for the public generally, that a bridge should be erected across the said West-River, at or near where the said public road crosses the same, and that the said town of *Brookline* and New-Fane, had attempted to agree upon the time and place for erecting said bridge, and also upon the proportion, which each of said towns ought to pay towards the expense of building said bridge, but had failed to agree upon the same; and that the towns of *Westminster* and Putney, in said county of Windham, they being towns adjoining said town of *Brookline*, would be particularly benefited by the erection of said bridge, and ought to pay a proportion of the expense of building the same; and praying for the appointment of a disinterested and judicious committee, to view the premises, to designate the place where the said bridge should be erected, and determine what proportion of said expense each of said four towns ought to pay: and further set forth a regular citation to, and ser-



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pon, the said four towns, citing them to appear before said court, and show cause against the granting of said petition. Further set forth a regular proceeding before said court on said petition, the appointment of a committee, their report to said court, the objections to said report, and the acceptance of the same, and the order of said court for the erection of said bridge, and assessing said town of *Westminster*, as their portion of the expense of erecting said bridge, the same rate now demanded in this suit : and further, that said *Brookline* had erected said bridge, and given notice to said *Westminster* of the expense, and demanded payment of their portion of the same. This statement drawn from the declaration referred to, render intelligible the points named in the exceptions. These exceptions, and also a motion in arrest, that was made in the county court, have now been argued, and we have them under consideration. This motion in arrest depends upon the question, what force there is in said order of the county court for the erection of said bridge, and apportioning the expense. If that is binding upon the parties, the declaration is good ; otherwise, it is not, for it is particularly described in the declaration as the foundation of the action.

This case shows an objection raised to the parol proof of the facts of the town of *Brookline* in erecting the bridge. It is urged that no record proof should have been adduced. We see no reason why the proceedings and order of the county court do not constitute record evidence of the doings of the town thus far. That the declaration sets forth, that the inhabitants of the town petitioned, &c. The objection appears to have been taken on the hearing of that declaration, to require proof how the said inhabitants acted, whether they were duly warned regularly warned for that purpose or not, all thus far may be presumed regular. The actual erection of the bridge may only be proved by parol. And whether the town had hired their workmen for such erection, or had contracted by vote at a meeting, duly warned for that purpose; or whether the selectmen or other inhabitants stood personally holden, in behalf of the town to those workmen, is what concerns them rather than the town of *Westminster*. If too large a sum was charged upon *Westminster*, either by the folly or extravagance of *Brookline*, the objection to that might be raised in defence of this action. But the declaration shows no dispute about that. This objection cannot avail. We also overrule the objection to the proof adduced, to show that one was selectman of *Westminster*, when notice was given of this claim, and payment demanded. The proof was rather

light. He was reputed, and professed, to be selectman, and acted as such in receiving the notice. Nothing was wanting, but further proof of his acting in that office on other occasions. But it seems, that the man, who went to give notice, enquired of some of the inhabitants of *Westminster* who was their first select man? and was informed that it was Mr. Cone, and he found him, and asked him if he was such? and received an affirmative answer. It would have been so easy for either party to have saved the trouble of the present argument, upon this point, by producing a copy of the record, showing who were selectmen at that time, it is rather to be wondered at, that it was not done. This objection bears too lightly upon the justice of the case, to require a new trial, under such circumstances. We consider the notice was correctly given to the select men, and the town clerk was not the person to receive such notice. The select men have, by statute, the care of the prudential affairs of the town. They were the persons, who should decide, whether payment should be made, or a suit defended, or whether they would warn a town meeting, and refer the subject to the inhabitants when together. No such powers are given to the town clerk; and there seems no reason for giving him the notice, unless it be the presumption, that he would carefully communicate the same to the select men.

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The principal point in the case, seems to be what relates to the validity of the order of the county court, made on the petition of the inhabitants of *Brookline*, and the extent, to which it is binding upon the parties in this action. And there can be no doubt of its binding force, so far as it extends, if the court that made it, had jurisdiction and power to make such an order, and had the subject regularly before them.

But the defendants contend, that West river was not between New-Fane and *Brookline*, in such a sense as to bring the case within that statute, which authorizes the court to assess other towns, benefited, with any part of the expense of erecting the bridge. This objection is, that the whole river does not lie between the two towns, but the northeastwardly edge of the river is the boundary line. On examining the statute, which set off to *Brookline* a portion of the township of New-Fane, we find the boundary to be as above mentioned; so that the whole river, at least in low water, is in New-Fane. It is contended, that the statute in question was made with a special reference to the towns lying upon Onion river, neither of which includes the river, according to charter boundaries. It will be of no use for this Court to

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conjecture what particular cases the legislature had in view, when they enacted the provision, that, "when a river runs between two towns, they shall jointly erect and keep in repair all necessary bridges: and other towns, particularly benefited by such bridge or bridges, may be assessed, by the county court, with a portion of the expense." We must give a construction to the statute in reference to its plain import, and the cases, that come equally within its spirit and meaning. When a river runs between two towns in the sense that Onion river does, neither town can erect a bridge across it, without placing some part of it in the other town. The travellers literally go out of one town into the other, by crossing such bridge. In this respect, there is no difference, whether the river is in neither town, as Onion river, or is all in one town, as West-River is in New-Fane. New-Fane may erect a bridge to the line of *Brookline*; and it cannot be kept there through any flood; nor could it admit of travelling across it while there, without being extended many feet, if not some rods, into *Brookline*. The two towns must unite in erecting the bridge, or there will be none erected. This river runs sufficiently between the two towns to give the county court jurisdiction over the subject matter of the petition of the inhabitants of *Brookline*, upon which they acted, in making the order in question.

It is further urged, as an appendage to this objection, that the order does not place the bridge where there was any road at the time, nor within the space described in the petition. The petition prays for a bridge to be erected at or near a certain ford-way. It is said, this is ninety rods further up the river than that ford-way; and so it appears by the record of the committee's report. The fact, also, appears, that there was a road on each side of the river, and pretty near the river too, as far up, as where the bridge was located; and no very safe and convenient place for a bridge, nearer said ford-way. Now, the question arises, was this bridge located at, or near, said ford-way, within the meaning of said petition, and within the object contemplated by the statute, to provide a bridge to accommodate the road, which crosses the river at said ford-way? Upon this question, it is evident, no statute should regulate the erection of bridges in such manner, as to compel their erection exactly upon an existing road, whether such bridge could be kept there or not. There would be some power to locate the bridge in a safe and convenient place, if such can be found so near as to accommodate the travel upon such road. A careful examination of the statutes upon this subject, shows, that the le-

gislature were not wholly unmindful of the importance of such a provision. Although the beginning of the fourteenth section (see page 432,) speaks only of a case where a bridge becomes necessary upon a public road across any river &c, ; yet it enacts, that the committee must ascertain and report whether such bridge is necessary ; and also at what place the same ought to be erected. This would be without meaning, if the legislature still intended that the bridge should, at all events, be placed exactly where the road crossed the stream. If the committee had a right to fix any other place for the bridge, than where the road crosses the river, their having done so in this case, and the court, which alone could act upon the subject, having confirmed their location, that is conclusive upon the parties, whether the committee acted judiciously or not. But we hear no complaint against the prudence of the location, if the committee kept within their powers.

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Other difficulties have been urged, more embarrassing to the Court, than those now disposed of. It is urged that nothing in the statute, or in the order of the court, authorized the town of *Brookline* to make the whole bridge, and then recover of other towns their proportion of the expense : but each town must be compelled by indictment to perform its duty, enjoined by the order of court. This objection is somewhat imposing ; and yet, if this prevail, the other provisions of the statute can be of little use. That four different towns can be compelled to act in concert in erecting a bridge, is not a supposable case. There must be some way to compel them all to employ one common agency in building, or pay their money into one common fund for that purpose ; or one town must build the bridge, and receive of the other towns their several portions, or there will never be a bridge. The statute, providing that a fine, assessed, shall be expended by a committee in repairs, seems to provide for a common agency to expend the money, in the cases to which it relates. But this statute, in terms, applies only to the repairing of roads and bridges ; not to the erecting of bridges. And the statute of 1821 allows indictment for not making roads. It does not name the making of bridges. Indeed, the erecting of such bridges as need any attention, otherwise than as a part of the road, seems to be treated, in our statutes, as a separate branch of the road concerns. All the provisions of the statutes, that are not exclusively confined to this branch, use expressions suited alone to cases of individual towns. There is no expression in any of the statutes, which seems to indicate that the legislature thought of enforcing, by in-

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dictment, the making of a bridge, when several towns were to do it. All the expressions used upon this branch are better adapted to the collection of the money from the towns that are petitioners. Not an expression is used, that supposes the towns, that are petitioners, are to perform any of the labor, or have any of the care in erecting the bridge. All the expressions used on the subject, seem to suppose that the towns will pay their proportion of the expense. Some of these will be noticed. One is as follows: "Such committee shall assess the towns, that will be particularly benefitted by the bridge, for the expense of building the same, in proportion to the benefits they will probably receive thereby." "And the court shall award and adjudge such costs, as to them shall appear just and equitable." There are two provisos: "Provided, that no town shall be liable to *pay* the expense of building such bridge, until after the expiration of one year from the rendition of such judgement as aforesaid." "Provided also, that none, but those notified, shall be assessed for the expense of building such bridge."

What, then, should be the mode of giving effect to this statute. If by indictment, it must be by the common law, or by an extension of the statute beyond its express provisions. One statute enforces a compliance with the order of the county court, by a penalty of five dollars a month upon the select men. A *scire facias* has been suggested as a remedy. But there has been no judgement against the town of *Westminster*, which ascertained and settled the amount they were holden to pay. The proportion only was settled by the order. The remedy must be such as will admit the amount to be litigated. That is a proper subject for a jury trial. The present action of assumpsit is as fit a remedy as any that has been mentioned. And it seems pertinent, that the town, complaining and procuring an order in their favor, against the other towns, should be assisted to obtain the effect of the decision in their favor. This must be the remedy, or there is none, but what is attended with as great or greater difficulties, than any presented in the present case.

As the statutes seem to have comprised within them an entire system with regard to roads and bridges, it is not a clear case that an indictment can be sustained, to compel an erection or repair in a case, where it is not prescribed in some of these statutes. The rule of strict construction in criminal prosecutions may be urged with much weight against such a proceeding. Whereas, in the civil remedy, sought by this action, the plaintiffs are entitled

to a liberal construction in favor of their rights, when they have expended their money, and the object of the public is thereby effected. The defendants, also, are enjoying the very benefit of this expenditure, which was contemplated as a reason for assessing upon them a portion of the expense.

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The judgement of the county court is affirmed.

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A petitioner has no claim in law, or equity, or by any analogy to the principles of law or equity, against the state, for monies he has been compelled to pay in consequence of being bail for one, who obtained an act of suspension, and departed from the liberties of the prison, and the act of suspension has been adjudged to be unconstitutional.

The petitioner presented his petition to the county court, at December term, 1831, pursuant to the provisions of the statute of 1831. The county court decided against him, and he excepted to their decision, and brought his case up to this Court under the provisions of said statute. The facts found by the county court, and certified in the bill of exceptions are these : In the fall of the year, 1821, one Charles Preston, of Brookfield, was a prisoner within the liberties of Chelsea jail, and the petitioner was his surety to the sheriff for the liberties. He was imprisoned on an execution in favor of Alden Spooner, then of Windsor. Preston, without the consent or knowledge of Davison, petitioned the legislature for, and obtained, an act of suspension, in what had been the usual form of such acts, freeing his body from arrest or imprisonment for five years ; and purporting to authorize him to leave said liberties, upon his lodging a true and attested copy of said act with the keeper of the prison. He accordingly lodged such copy with the jailer, and departed from the liberties. Davison was afterwards sued on said bond, and made defence ; but the court adjudged against him, on the ground that said suspension act was unconstitutional ; and he was obliged to pay, and did pay, the whole debt, amounting to about six hundred and sixty two dollars, besides his cost of defending the suit. After collecting all, that could probably ever be collected of Preston, there remained due to the petitioner upwards of three hundred and fifty dollars. The prayer of the petition was, that the court would allow him this sum against the state, according to the provisions of the statute of 1831. That statute authorized the court to make this allowance against the state, if they found the petitioner entitled to such relief,

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*either legally, or in analogy to the principles of law, or according to the principles of justice and equity.*

*Mr. Nutting, for the petitioner, after presenting a full view of the facts in the case, argued as follows :*

All these facts the Court say, " we have no difficulty in finding ;" and the only question presented to the Court is, whether these facts do " legally, or in analogy to legal principles, or according to the principles of justice and equity," entitle the petitioner to remuneration from the state.

We are not now to enquire, whether the act in question is in fact unconstitutional or not. It has been *decided* to be unconstitutional, and that, in the words of the statute, entitles the petitioner to claim remuneration. It is no matter whether the legislature exceeded their authority in passing the act, or whether the Court erred, or were corrupt, in deciding it unconstitutional : in either case, the petitioner's claim was equally good. Both the legislature, and the judiciary, are, in their several spheres, the state of Vermont. The legislature is the *state* in its legislative capacity ; and the Supreme Court is the *state* acting judicially. Both are vested with the authority of the state, which no individual can, with impunity, resist. And whether the general assembly or the court erred, is of no consequence to the petitioner : his money has been forced from him *by the authority of the state of Vermont* ; and the question is, whether the authority of the state of Vermont will restore it. Whether this Court will, because they have the power, say to the petitioner, " you have no remedy ; you cannot *compel* the state to do you justice ;" or, in the language of the county court, your claim is not *legally* binding on the state ; for the legislature, in passing the act complained of, exceeded their powers ; and the *law* says, " the principal is not bound by the acts of his agent, unless the agent keep strictly within his powers." Or, will not this Court rather say, the cold maxims of municipal law are wholly inapplicable to the present case ; for, as a sovereign state is not amenable to any human tribunal, so neither are its actions determined by any human law, but solely by its own sense of what is just, of what is right, of what is becoming its own dignity. The sovereign state of Vermont has, by the fault of its legislature or judiciary, no matter which, occasioned a loss to this petitioner ; and it is just and right, and becoming its own dignity, that the sovereign state of Vermont should make him remuneration. It is not contended, that this claim " is legally binding on the state." Laws are binding on subjects only, not on the sove-



reign. Sovereign power is above the reach of law. Yet "these," (in the language of *St. Paul*, too often forgotten,) "not having the law, are a law to themselves;" they are bound by the immutable principles of right and justice, which are equally obligatory on the sovereign and the subject.

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We come then to enquire whether this claim is, in the words of the statute, "according to the principles of *justice and equity*, binding on the state." And here it may be well to examine the relation that exists between the state and a citizen. Is it that, which exists between two citizens, two equals? By no means. It is rather the relation of parent and child; of superior and inferior; of sovereign and subject. "*Patria nostra*," says Cicero, "*quae est communis parens omnium nostrum*." The parent has the right, and the power, to control the actions of his child, and is bound to protect and indemnify his child while acting in obedience to his commands. So the state has a right to enact laws, for regulating and controlling the conduct of its citizens, and the power to enforce obedience to those laws; and is equally bound to protect and indemnify the citizens in rendering that obedience. The parent, though not bound by his own laws, is bound by a higher, the law of the state: So the state, though not bound by its own laws, is bound by a higher, the law of God, the principles of justice and equity, the eternal rule of right. But what are "the principles of justice and equity." What did our legislature mean by use of these words in the statute, under which this petitioner claims? Did they mean *that* justice, which is to be obtained in a court of law, or *that* equity, which is meted out in our courts of chancery? Did they mean to say to this Court, "if you shall be of opinion, that the petitioner could sue the state at law, or bring his bill in chancery, and enforce his claim, you may order remuneration? By no means. The legislature knew that the state could not be impleaded in a court of law, or equity. They must, therefore, have intended the expression, "principles of justice and equity," to be taken in its most general and comprehensive sense. And what is that sense? "Justice," says the *Cyclopaedia*, "in a general sense, or *universal* justice, comprehends the whole duty of man to God, to his neighbor and to himself. Justice, in a more restricted sense, and considered as a social virtue, denotes a constant desire, or inclination, to give every one his due; or a habit, by which the mind is disposed, and determined, to give every one his own." And "equity," as defined by *Grotius*, "is the correction of that, wherein the law, by reason of its universality, is deficient." Or, in the language of *St. Paul*,

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again, "what the law could not do, in that it was weak," equity steps in to accomplish.

Let us apply the principles of justice and equity, as here defined, to the present case. And can there be a doubt, that the state must remunerate the petitioner? The first duty required of citizens, is obedience to the laws of the land: and this duty is not only enjoined by the laws of the land, but by the law of God. It is not only a civil, but a religious duty. "Let every soul be subject to the higher power; for, the powers that be are ordained of God." "Observe every ordinance of man as unto the Lord," or as a religious duty. In the present case, the legislature passed an act, which, though deemed constitutional at the time, has since been decided unconstitutional. The petitioner, and all connected, rendered due obedience to that law, as they were bound to do; and, as a necessary consequence, the petitioner has, by the laws of the land, been deprived of a great share of his property; and now, who, upon principles of justice and equity, shall sustain this loss? If this were a case between two citizens, would not the whole world answer, he, who caused the loss, must bear it? I fall a tree upon my own lot, and contrary to my intention, it falls across the fence, and kills my neighbor's cattle. Who must sustain the loss? Not only the principles of justice, but our courts of law, say, I must bear it. And why? Not because I intended my neighbor harm; but because, through my act, the loss occurred. So if I, unintentionally, drop fire in my neighbor's barn, by which it is consumed, I must pay the damage; because I occasioned it. And suppose I direct my son, or my hired labourer, to go to such a lot, and cut such a particular tree; and he, not doubting my right to the tree, obeys: but it happens the tree is on my neighbor's land, and my labourer is prosecuted, and amerced in a fine and costs. Though the policy of our laws, for the prevention of trespasses, gives him no remedy upon me, would those laws justify me hereafter, at that tribunal, where not the "*policy of the law*, but the *principles of justice*," dictate the decree? And would not the whole world indignantly cry, *shame upon me*, if I refused to repay him every farthing he had expended? And should I attempt to shuffle and reply, "I verily thought the tree was mine;" "no matter." would be the answer; "you caused the act to be done, and you must bear the consequences." The state of Vermont, in their legislative capacity, have mistaken their powers, and passed an unconstitutional act, which has brought a heavy loss upon this petitioner; and *shame! shame!* be to the state, if they do not remu-

nerate him. I trouble no man's books for authorities in this case : I appeal to no authorities in a case so plain. God has implanted in all his intelligent creatures a sense of right and wrong ; and to that sense, implanted in the breasts of this honorable Court, I appeal for support in the positions I have taken.

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We have thus far presented the case as between two citizens—two equals. But take it as it is ; the state and the petitioner, standing to each other in the relation of parent and child, or sovereign and subject ; and are not the obligations of the state to remunerate the petitioner strengthened ? I appeal to those of this honorable Court who are parents, and particularly to his honor, the *Chief Justice*, with whose parental affections and sense of parental obligations, and duties, I am in some measure acquainted. Suppose his honor, on leaving home for this circuit, had called his little son, and said, “ my son we have provided an excellent school master ; you must be a good boy, attend school constantly, and be obedient, and do whatever the master bids you. Suppose, that, on his honor's return, he finds that the master had requested his son to run to such a house, whose occupant was absent, and bring him such a book ; his son had obeyed, had been prosecuted for stealing the book ; and, right or wrong, had been sentenced to pay a fine and costs, and stand committed till sentence of court be complied with, and was then actually in prison. Suppose, that, on hastening to the prison, the son should say, father, I did just as you bid me. I obeyed the master, and have been shut up in this cold dark room a month for it ; and am almost starved : will you suffer me to remain here always for doing as you bid me ? What would his honor answer, when tears would permit him to speak ? Would he say, in the language of the county court, “ the master had no right to send you for the book ; you should have examined his authority before you obeyed him. I can afford you no relief.” Or rather would he not answer, “ God forbid, my son, that you should suffer this wrong. It was the master's fault, or rather it was my fault, in not providing a more discreet master, and mine shall be the punishment, whatever it be.” The man would be a beast who could answer otherwise. How far is this supposed case from being parallel to that on trial ?

Can any claim or laches be imputed to the petitioner ? The legislature, without the knowledge of the petitioner, “ by the authority of the state of Vermont,” enacted, that the body of Charles Preston should be free from arrest and imprisonment for the term of five years ; and further *commanded* all sheriffs, jailors, and other officers, having the said Charles in custody, on receiving a certi-

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fied copy of this act, to release and discharge him. And Preston had lodged a certified copy of the act with the jailor, and was discharged, before the petitioner knew of the passing of the act. What opportunity, then, had the petitioner to examine the *authority* of the legislature to pass the act, scores of which they had been passing every session, for more than twenty years preceding, and which the state, in its judicial and executive power, had, at least by acquiescence, sanctioned during the whole of the time? But suppose he had examined the constitution, and discovered that the act was unconstitutional, and suppose he had made this discovery before Preston left the liberties; how could he have prevented it? If he had availed himself of the statute of 1812, and recommitted him, or attempted to recommit, would an officer have served a precept upon him in defiance of the act? If he had succeeded in recommitting him, had we a court in the state of Vermont, which would not have liberated him on a *habeas corpus*? and if Preston had sued both the petitioner and his officer for false imprisonment, was there a court in the state, which would not have given judgement against them? How cold hearted, how cruel, to wish that the state should refuse remuneration to this petitioner, because he did not resist a law of the state, which, at that time, he, with all the rest of the state, believed constitutional! which he had not the power to resist, and for resisting which, if he could have done it, the state would have most certainly punished him! Suppose a foreign despot, who unites in himself supreme, legislative, judicial, and executive power, should himself arraign, try, condemn and execute, a subject for doing what he had expressly commanded, should we not call him unjust, cruel tyrant? Is the state of Vermont ambitious of that character? and will this honorable Court, by refusing remuneration to this petitioner, help to affix it upon her?

The case is to me very plain; but to make it still plainer: in the case before put, when the hired labourer had to pay a fine and costs for cutting timber by my express orders, and which he verily believed to be on my land; suppose this laborer applies to an attorney to know whether the law would not compel me to remunerate him. The attorney says, "no, the law compels no contribution in trespass." Says the laborer, "you have courts of equity, will not they compel him to pay me?" "No," says the lawyer, "they take no cognisance of such matters, or the principles of equity, found in the books on this subject, do not differ from the law." "But," says the laborer, "I appeal to you as an

honest man, *ought* he not on *principles of justice and equity* to remunerate me?" "Aye, indeed, he ought, and he is a scoundrel if he does not repay you the utmost farthing." "Very well," replies the laborer, "I have no reason to doubt you decided right as a *lawyer*; but I know you have decided right as an *honest man*, and the decisions are very different, and hereafter, let me tell you, I shall take my causes for decision, to honest men rather than to lawyers." With precisely these views, the petitioner brings his claim before this honorable Court for decision; and he asks them, whether the state *ought* not on *principles of justice and equity* to repay him the money, which has been taken from him by their unconstitutional act. He knows, that, by the ordinary rules of procedure in our courts of law and equity, he can obtain no redress. But he also knows that this Court are a special tribunal, have a special commission to try and determine cases of this kind, and that they are to be decided "according to the principles of justice and equity." If the *principles of justice and equity* in this commission, in this statute, mean no more than that scanty pittance of either, which our courts of chancery, shackled and trammelled as they are with the forms, precedents, rules, and decisions of a thousand years, are now enabled to deal out, he may have doubts: but if they mean the *inscrutable rules of right*; if they are to be taken in their common acceptance; in short, if they are to be construed as the *honest man*, not the *lawyer*, would construe them, he can have no fears.

It may not be improper to enquire, what was the object of the legislature in passing that act? To consider the old law, the evil, and the remedy. By the old law, or previous to this remedial statute, petitioners applied directly to the legislature. What was the evil of this? The difficulty, or rather the impossibility, of procuring all the facts relative to the several petitions. To remedy this evil, and this only, as it appears to me, the act of 1831 was passed, giving cognisance of this class of claims to the county court, with appellate jurisdiction to this Court. Will it be pretended, that the legislature intended to constitute the several county courts keepers of its conscience? to instruct in its duty? to inform what it ought to do, in any given state of facts? I believe our legislature have never been accused of any such unreasonable degree of inodesty. But this might, with more plausibility, be contended had the legislature never acted upon similar cases, and thus manifested their sense of the obligation of the state to remunerate such sufferers, in repeated instances. The case of Parley Davis,

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Orange Fifield, Simeon Wright, Conrade Sax, and many others within the recollection of the Court, show clearly, that the state has invariably recognised its obligations to remunerate all those who have proved themselves to have sustained losses in consequence of rendering obedience to unconstitutional legislative acts. And the object of the statute of 1831 was merely to ascertain with greater certainty and facility, who had in fact so suffered, and the amount of their several losses ; and not to ask the opinion of the several county courts, whether the state ought to remunerate these losses when proved.

As the county court have found all the facts in this case, we trust this honorable Court will decree remuneration to the petitioner, to the extent of his loss, as found by the county court ; and we believe, that they would as readily decree him his interests and costs, did the statute leave them at liberty so to do.

*Mr. Buck, state's attorney*, for said county, was asked by the Court, if he was disposed to present any observations on the other side, and he answered in the negative.

*The opinion of the Court was pronounced by*

HUTCHINSON, C. J.—The Court have fully considered this subject, and are all perfectly agreed in the result, to which we have arrived, except Mr. JUSTICE ROYCE, who declines saying any thing about it, on account of the situation, in which similar statutes have placed him, and some of his friends and connexions.

It is important that we ascertain, as correctly as possible, by what rule the legislature intended we should be governed in exercising the powers given by the statute of 1831. The expressions of the statute authorizes the relief sought, if the petitioner is entitled, either *legally or in analogy to the principles of law*, or, *according to the principles of justice and equity*. There is no pretence of his being *legally* entitled to this relief. If he were thus entitled, he would bring an action instead of his petition. What is intended by his being entitled to relief by *any analogy to the principles of law* ? This probably means, that the court should grant the relief sought, if the petitioner makes out such a claim as would be recoverable at law, if the state were liable to an action at law. So if he makes out such a claim as would entitle him to relief in a court of chancery, if the state were liable to a suit in such court, this would entitle him to relief now, according to the principles of justice and equity. I know not what further than this

the legislature could mean. They surely could not mean that we should do that justice and equity to the petitioner, which would be doing equal injustice, and be the contrary of all equity, as regards the state.

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This claim is founded on a supposed wrongful act of the state, in their legislature's passing a suspension act in favor of Preston, which, in its result, has occasioned a loss to the petitioner; and the case shows, that this act passed without the consent or knowledge of the petitioner. Similar statutes have, heretofore, been frequent in this state; and they have been enacted in answer to the petition of some person confined in prison for debt. And, usually, notice of such petition has been given to the creditors, by personal service, or by a publication in some newspaper, that is circulated among them. Usually, also, the friends of the petitioner have exercised their friendship in aiding his petition, and convincing the legislature of the propriety of granting it. In process of time, these statutes have been decided to be unconstitutional, and void. This was first decided by the circuit court of the United States; and, afterwards, by the Supreme Court of this state.

When Preston applied to the legislature for his act of suspension, he considered himself as asking a favor. They granted his request, and enacted the statute in question. They thought they did him a favour by passing the act. They did it without fee or reward. They were all honest, and supposed they were doing what was right. They were as honest and humane, in granting this favor, as Preston was honest and fervent, in his petition for it. He supposed it would be beneficial to him, or he would not have asked for it. The supposed benefit to him was the only motive for their granting it.

Now, we do not know that such a thing was ever heard of since the world began, as that he, who complies with the request of another, and does him a kindness, without fee or reward, was considered liable for any injurious consequences of such kindness. He heard his request; he saw his distress; he honestly supposed the granting that request would be a kindness. He granted that request. It proved not to be that kindness that was intended and supposed. It proved an injury to him, or his friends. No system of morals, ever published, contains an intimation that this benevolent donor is holden to make good that injury.

Look at the daily occurrences in life. A man lends his poor neighbor a horse to carry his grain to mill. He expects no reward. In going to mill the horse, for the first time in his life, falls



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under his burden. In falling, he breaks the poor man's leg; or he becomes terrified and veers, and breaks down another man's fence; or, while waiting for his grinding, the poor man commits a trespass, which he would not have been there to commit, if he had not borrowed the horse. Is the owner of this horse to be punished for his benevolence, by making good all these damages? No one will pretend this. The cases of cutting trees, stated by counsel, are not so stated as to form a parallel with this. In all those cases, where the counsel set his laborers at work for his benefit, and the injuries happened, which he has stated, he would be liable to make good those injuries. He would be liable, not only upon principles of justice and equity, but upon principles of law. He set his laborers at work for his benefit. He set them about his own work. He did not tell them to go and commit a trespass; but to go and labor for him in his ordinary business. As between him and his hired man, the latter was no trespasser. If the owner recovers against this hired man, no law to prevent a contribution among trespassers, will be in the way of this hired man's recovering an indemnity of his employer.

We may vary this case, and make it more parallel. Take away the circumstance that the counsel set his laborers at work, and told them where to work; take away the circumstance, that he set them at work for his own benefit; and let him be applied to by a neighbor for licence to cut a particular tree on his land: he grants the licence without expecting any compensation, and both honestly believing the tree to be on his land. The tree is cut, and carried away and used. It turns out, that this tree stood upon another man's land: the owner sues the man who cut it, and recovers his damages. Would this counsel admit—would any one pretend—that he was liable to remunerate these damages? We believe not. Had he sold the tree, supposing it to be upon his own land, that would have made a different case. So if the legislature had made a grant to Preston of some property, which it was supposed the state owned, and the state had received from him a compensation for it. It turns out that he can have no benefit from the grant, because the state did not own the property. In such a case, in analogy to the principles of law, as well as according to the principles of justice and equity, the state ought to refund the money he paid them, and interest upon it. Whether he would be entitled to receive any thing more, for losses connected with his purchase, would depend much upon the question how far he prudently relied upon his grant, till these losses were incur-

red. But, if this grant had been made in good faith, all believing that the state had a right to make the grant of this property, and no compensation was made or expected for it; if it was a mere gift; no after circumstances of the loss of this property could give Preston the least possible claim against the state for remuneration, either legally, or in analogy to the principles of law, or according to the principles of justice and equity.

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The counsel for the petitioner urges, that Preston acted in *obedience* to a law of the state. This is not a happy expression to describe the true case. When statutes are made to regulate the conduct of citizens, and requiring their obedience to rules prescribed in those statutes, those, who observe these rules, may talk of obedience to these statutes. But a man who acts for himself, in his own concerns, and governs himself by his own views of prudence, is compelled to no particular course by any statute, but acts under a mere gratuitous grant, made at his request, and for his benefit, which benefit he may try to enjoy, or let it alone, just as suits his convenience. Such a man should not use the word *obedience* to describe his own actions. His *obedience* was to his own will, not to any statute; to a mistaken view of his own interest, not to the requisitions of the state.

What is now said may, also, serve to correct the view presented of a boy, who, in obedience to an indefinite, and, perhaps, an unwise command, commits a mere trespass, and is prosecuted for a theft. The command and obedience form the whole of the case, thus stated. Preston acted under no command of the legislature; he exercised no obedience to any such command.

It is urged, as a ground of equity, that the petitioner, the bail of Preston, knew nothing of Preston's petition, till his difficulty was brought upon him. This circumstance may add to his hardship, as between him and Preston, but gives him no equity as against the state. Preston ought to have let his bail know of his petition, and of his statute, before he departed from the liberties of the prison. But the legislature were under no obligation to give him any notice of either. When he became bail for Preston, he undertook the risk of whatever voluntary act of Preston might operate to charge his bail. The procuring this statute, and acting under it, were as much the voluntary acts of Preston, as would have been the departing from the liberties without such an act. If the petitioner was ignorant of these proceedings, the blame rests alone on Preston, whose duty it was to inform him. He ought not to have departed from the liberties, till he had made known to his bail the reasons

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why he was about to do it, and obtained the consent of his bail ; or thereby given his bail an opportunity to discharge himself by a recommitment of his principal, as he might have done by virtue of a general statute.

It is not easy to believe that a remuneration would be thought of, in this case, if an individual were substituted in place of the state. Suppose an individual, having funds in a distant bank, had felt disposed to relieve Preston, and had drawn him a regular draft upon this bank for a sufficient sum to afford him full relief, and had delivered him this as a mere gratuity. Preston receives it thankfully ; and, instead of waiting to get his money and pay up his debt, he is so sure of his money in a few days, that he ventures to depart from the liberties. The bank fails, and the draft becomes of no use ; and the money is collected of the petitioner, as it has now been collected. In the progress of these proceedings, the petitioner was as ignorant of what was doing, as he has now been. Would the petitioner pretend, or any one in his behalf, that he had any sort of claim, even in the lowest grade or kind of equity imaginable, to a remuneration from the benevolent individual who drew the draft ? We presume not. And yet, that benevolent act was, in one sense, the cause of this burden coming upon the petitioner.

Should full effect be given to the reasons, urged in behalf of this petition, the consequences would be alarming. The general assembly are treated as the state in their legislative capacity, and the courts as the state in their judicial capacity. From this view, the state are to be made responsible to every citizen for every injury he may sustain, even collaterally, from every mistake in the legislature, let them act ever so honestly, and with the utmost disinterestedness and liberality. The same argument would apply with equal force to bind the state to make good, to each individual, the loss he may sustain by a wrong decision of the Court. Indeed, this forms one horn of the dilemma in the present case. If the position is tenable, in this case, it will be so in every other, where the body applied to for relief are satisfied, that a wrong decision has been made to the injury of the applicant. But there is a sort of counterpart to this argument, interwoven in the argument itself, while the argument presents all possible equity, that can be found in the one, who is to receive the money, we are led to search for an equitable payer ; some, concerning whom, it will be just and equitable to compel them to pay this money. If the foregoing observations are correct, there is no more equity, that the

whole state should pay this money, than, that any portion of the inhabitants should pay it ; or that the petitioner should bear the burden alone. The hardship may be less, because the whole state is more able to pay. But that is no tenable ground to ascertain, or regulate, equity. The rich and the poor must be governed by, and enjoy, the same rules of justice and equity.

Upon the whole, we discover no ground to allow this claim, either from legal obligation of the state, or from any analogy to the principles of law, nor according to the principles of justice and equity ; nor, we may add, from any principle of fair deal among men. If it is allowed at all, it must be allowed from a principle of generosity merely. We have no right to allow it from that principle. The legislature could not have intended to give us power to allow claims upon that principle. They have no right to pass a law that would give such power. They have no right to pass a law that would take the money from the people and give it away. If they give at all, they must give as individuals, and that from their own purses ; and not, as legislators, give from the purse of the people.

The judgement of the county court, which disallowed the claim of the petitioner, is affirmed.



CHARLES PIERCE *vs.* SALLY JOHNSON, executrix of JAMES JOHNSON.

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An action upon a covenant of seizin is barred by the statute in eight years from the execution of the deed, which contains such covenant.

Such covenant of seizin is, in a sense, a covenant to secure the title of land ; yet the section of the statute which bars only in ten years after a decision against the title of the grantor, must be considered as referring to covenants of warranty, upon which no action will lie, till after eviction.

This was an action of *assumpsit* upon a promissory note. The defendant pleaded *non assumpsit*. He, also, pleaded a plea in offset of covenant broken, upon a covenant of seizin contained in a deed of conveyance of land. The covenant, as declared upon, was, *that the plaintiff, at the ensealing of said deed, was well seized of said land in fee simple, and that he had good right and lawful authority to sell the same in manner and form as above written.* To this plea in offset the plaintiff replied the statute of limitations of eight years ; and also another replication, that the cause of action did not accrue within ten years, relying upon another section of the statute. The defendant rejoined to these re-

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plications, that there had been no recovery against the title of the grantor. To this rejoinder the plaintiff demurred, and the defendant joined in demurrer. The county court decided that the plaintiff's replications were sufficient, and the defendant's rejoinder insufficient. The defendants excepted to this decision, and the cause was brought up to the Supreme Court, upon this exception.

*Smith and Peck, for the defendant.*—The only question, raised by the pleadings, is, whether the covenant of seizin is a covenant to secure the *title*. The words of the covenant are, “that I am well seized of the premises in fee simple,” &c. The words, *fee simple*, import an absolute inheritance, clear of any consideration, limitation, or restriction ; (2 *Black. Com.* 106 ; *Litt. sec. 1 and 2* ; *Co. Litt.* 1 *b* ;) and, in the sense now used in this country, they import an estate of inheritance in law, belonging to the owner, and transmissible to his heirs.—4 *Kent's Com.* 3, 4. The inquiry, then, on the trial of an issue formed on an alleged breach of this covenant, must necessarily be, was the grantor owner of, and seized of, an estate of inheritance in the land conveyed ? Or in other words, had he a title to it ? In *Halsey vs. Hales*, (7 *T. R.* 194,) and in *Amherst vs. Skynner*, (12 *East*, 263,) the Court view the individual, who is seized *in fee*, as having the title ; and it is supposed, that, if he is not owner of the land, he cannot be seized *in fee* : so that it would seem, had the words, “of an indefeasible estate,” been added to the covenant in the case at bar, it would not have altered its effect. In *Howell vs. Richards*, (11 *East*, 632,) Lord Ellenborough treats the covenant of seizin as a covenant *for title*. He there said, “the covenant for title is an assurance to the purchaser, that the grantor has the very estate in quantity and quality, which he purports to convey, *viz*, in this case an indefeasible estate in *fee simple*.” So in the case of *Gray vs. Briscoe*, (*Noy*, 742,) the defendant covenanted, that he was seized of *Blackacre*, in fee ; whereas in truth it was copyhold land, in fee, according to the custom : and the court held the plaintiff entitled to damages, as he had not a title in *fee simple*, as he had covenanted he had ; which fortifies the opinion of Lord Ellenborough, in *Howell vs. Richards*. In *Abbott vs. Allen et al.* (14 *Johns. Rep.* 248,) which was an action for the breach of a covenant of seizin, the court say, “the grantors have asserted in their deed, that the *title* was in them. If that be true, they can show it ; if it be untrue, then the covenant is broken ; and it is

perfectly immaterial whether the real title be in one stranger or another." In *Morris vs. Phelps*, (5 *Johns. Rep.* 49,) which was also an action for a breach of the covenant of seizin, the covenant being precisely similar to the one now before the Court, the whole drift of the evidence was, to show the *legal title* out of the grantor. In *Williams vs. Wetherbee*, (1 *Aik. Rep.* 233,) the defendant interposed a plea similar to the one now under consideration. But *Paddock*, of counsel for the defendant, on argument abandoned it, as he was of opinion that it could not be sustained; and of this opinion was the Court. This is a direct authority for the defendant. In *Bickford vs. Page*, (2 *Mass. Rep.* 462, n.) and *Hastings vs. Webber*, (2 *Vt. Rep.* 407,) it was said by the Court, that an action of covenant broken in a deed conveying land, in which a breach is assigned, that the defendant was not seized, or had no right to convey the land, brings the *title directly* in question. It is difficult to see how the title, in such case, is brought *directly* in question, unless the covenant of seizin is a covenant for title. In 3 *Saund.* (*Index, title Covenant, and p.* 181, a. b.) a covenant of seizin is classed under the head of covenants for title. So, in an action on a covenant of seizin, it is sufficient for the plaintiff to say that the defendant was not seized in fee, by which he puts the defendant upon showing what title he had in the premises; which then puts the plaintiff on showing a special title in some body else.—9 *Co.* 60; *Cro. Jac.* 360; *Swift's Dig.* 664. This clearly proves, that the title is the very thing in dispute. The position taken by the defendant is strengthened by the fact, that the rule of damages in an action for the breach of the covenant of seizin and warranty, is the same.—4 *Kent's Com.* 462, 4; 5 *Johns. Rep.* 49.

It is objected that the covenant of seizin is a personal covenant, and does not pass with the land. But in England this covenant is regarded as a real covenant; and is said to run with the land.—*Shep. Touch. c.* 7, 161; 1 *M. and S.* 355; 4 *do.* 53, 188; 5 *Taunt.* 418; 2 *Blac. Com.* 224, n. However this may be, it by no means follows, that, because it is not a real covenant, it cannot, therefore, be a covenant to secure the title; for if all real covenants were of this character, then would a covenant to pay rent, or to produce title deeds, or for renewal, be covenants for titles, for they are real covenants and run with the land.—4 *Kent's Com.* 460. But a covenant of warranty is also a personal covenant, and, when broken, becomes a mere *chose in action*, and is not assignable.—*Ibid.*

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*Buck and Upham, for plaintiff.*—The pleadings present the following question for the decision of the Court, to wit : Is the covenant of seizin in a deed of conveyance a covenant to secure the title of lands? Should the court answer this question in the affirmative, then the statute of limitations will not avail us as an answer to the defendant's plea in offset. The statute declares and enacts, that "all actions of covenant, *other than covenants contained in deeds of conveyances of lands, for the securing the title of said lands,*" shall be commenced "within eight years after the cause of such actions shall have accrued, and not after. And all actions of covenant, brought on any covenants, contained in any deed of conveyance of lands, as aforesaid, within ten years next after there shall have been a final decision against the title of the covenantor, in such deed."—*Statute, 290, s. 8.* Now, we insist, that the covenant of seizin in a deed, is not a covenant to secure the title of lands. The grantor usually covenants in his deed, 1. That he is the sole owner of the premises : 2. That he has good right and title to convey the same : 3. That they are free from every incumbrance ; and 4. That he will *warrant and defend* the same against all lawful claims whatever. This last covenant, which is to secure the title of the lands conveyed, cannot be broken, but by an eviction or ouster, by some title paramount to the grantor. Or, in other words, the grantee can maintain no action upon this covenant, until he be dispossessed of the lands conveyed by judgement of law. After ouster the cause of action accrues, and the statute begins to run.—*Twambly vs. Henley, 4 Mass. 441 ; Marston vs. Hobbs, 2 Ib. 433 ; Bearce vs. Jackson, 4 Ib. 408, 627 ; Chapel vs. Bull, 17 Ib. 213 ; Williams vs. Wetherbee, 1 Aikens' Rep. 241.*

The covenant, that the lands are free from every incumbrance is broken immediately by any subsisting incumbrance ; and the grantee is not obliged to wait until he is actually evicted ; but may immediately call on his grantor for indemnity. So, the covenants, that the covenantor is seized in fee of the premises, and has good right to convey the same, when in fact he has no right, are broken immediately on the execution of the deed containing them. And the statute immediately commences running. *Prescott vs. Trueman, 4 Mass. R. 627, 108, 441 ; Bickford vs. Page, 2 Ib. 455, 433 ; 4 John. Rep. 72 ; 5 Conn. Rep. 497.* A warranty in a deed of conveyance is defined to be a covenant real, annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same. Or it is where a man is bound to



warrant the land or hereditaments, that another hath.—1 *Shepard's Touch.* 181 ; 1 *Swift's Dig.* 366. *Blackstone* says, by the warranty the grantor doth, for himself and his heirs, warrant and secure to the grantee the estate granted.—2 *Com.* 300. In *Williams vs. Wetherbee*, 1 *Aik. R.* 233, it was said by the court, that the covenant of warranty is something more than a covenant for quiet enjoyment. It is a covenant to defend, not the possession merely, but the land and the estate in it. It is most manifest, that the covenant of warranty is introduced into a deed of conveyance for the express purpose of securing to the grantee the estate conveyed. It is a real covenant, and runs with the land ; the warranty passes to every assignee ; and the last assignee, when evicted, has a right to call on all the prior warrantors, in the deed, till he has obtained satisfaction.

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The statute allows the grantee ten years next after a final decision against his title, to commence an action upon this covenant. The limitation of ten years applies only to such covenants as are not broken, until after a final determination against the covenantor's title. Actions upon the other covenants in a deed are limited to eight years. The covenant of seizin, if broken at all, is broken immediately upon the execution of the deed ; and no action can be maintained upon it after the lapse of eight years. When broken, this covenant is a mere *chose in action*, and not assignable.—1 *Aikens' Rep.* 233 ; *Hamilton vs. Wilson*, 4 *Johns. Rep.* 72 ; *Garfield vs. Williams*, 2 *Vt. Rep.* 327. Although an action upon the covenant of seizin, in a deed of conveyance, may bring the title of lands in question, still, it is not the covenant given by the grantor to secure and make good to the grantee the title of the estate conveyed. The covenant of warranty binds the covenantor, not only to defend the possession, but to secure to the grantee the estate conveyed.

By the common law, the warrantee and his heirs may also, at any time, before they are impleaded for the lands, bring a *warrantia chartæ* upon the warranty in the deed against the warrantor or his heirs, and thereby all the lands the warrantor has by descent from the ancestor, who made the warranty, at the time of the writ brought, shall be bound, and charged with the warranty, into whosoever hands it goes afterwards. So if the lands warranted be afterwards recovered of the warrantee, he shall have as much land over again of the other land of the heir of the covenantor, or of the warrantor himself, if he be living.—*Co. Lit.* 101, 393 ; 1 *Swift's Dig.* 367. This ancient remedy given by the common

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law, shows that the warranty was the covenant upon which the warrantee relied to secure his title to the estate conveyed. This remedy by *warrantia chartæ* could only be pursued upon the covenant of warranty. None of the other covenants in a deed would warrant this proceeding.

*The defendant's counsel*, in reply, urged the supposition, that a deed contains no covenant of warranty but does contain a covenant of seizin ; and the grantee is evicted after ten years possession, whether he has any and what remedy, unless this covenant of seizin be considered a covenant to secure title.

HUTCHINSON, C. J., pronounced the opinion of the Court.— We are called upon, by these pleadings, to decide what is intended by some expressions in the section of the statute of limitations, which has been read by the plaintiff's counsel. The Court have had some difficulty upon this section before ; and it is not very easy to give it any practical construction, that is perfectly free from all doubt, as to what was intended by the legislature.

The question is, whether the action upon this covenant is barred in eight years from the breach of the covenant ; that is from the date of the deed, according to the first clause of the section : or, whether it is a case only barred in ten years after a decision against the title of the grantor, according to the after provisions of the same section. If it comes within the latter clause, the rejoinder is a good answer to the replication, which presents the statute as a bar : for the statute would not commence running in such a case, till there had been a decision against the title of the grantor. Otherwise, if it comes within the first clause of the section ; because that clause has no reference to a decision against title, but only to the time when the cause of action shall have accrued : and that, upon the usual covenant of seizin, is at the date or execution of the deed, if ever. The covenant is, that, at the ensealing of the deed, he is well seized, &c., not that he will be so at any future time.

Upon reading this statute, it is manifest, that the question, already stated, must be decided by deciding one in different shape, to wit, whether the covenant declared upon in this plea in offset, is a covenant for securing the title of land, conveyed by said deed, within the meaning of this section of the statute ? It is a covenant in a deed of conveyance of land ; and it is a covenant of, or about title. Still the question remains, is it what the legislature term, a

covenant for the security of title. Now all the common covenants in deeds of conveyance of lands, are, in some sense, for the security of title. None of them furnish any perfect security, that the grantee and his heirs and assigns shall in fact hold the land; but all are intended as security, that the grantee shall recover adequate damages if he fails to hold the land. Even the covenant against incumbrances is of this character. A covenant, that the grantor is seized of the premises, and nothing more, has no reference to title, but only to the having possession under some claim of title. This naked covenant of seizin was probably introduced for the purpose of securing an easy entrance upon the land by the grantee, or to guard against the effect of an adverse possession, which would render the deed void, as an instrument of conveyance, and throw the grantee upon his covenants as a remedy. For either or both of these purposes, the naked covenant of seizin would be adequate and useful. The doctrine, established in some of the neighboring states, that the covenant of seizin is satisfied by a possession without title, cannot well be reconciled to sound reason, except when applied to the naked covenant of seizin, without any words that imply any other right but mere possession. It has always been customary, in this state, to add to that covenant words extending beyond a mere possession, without, or with claim of title. In the case of *Moses Catlin vs. Dan Hurlburt*, reported in the third volume of Vermont Reports, page 403, the covenant was in the same words as in the present case, "and had good right to sell," &c. That was adjudged to be a covenant of good title, and the plaintiff recovered the consideration money and interest. The defendant, in this case, covenants that he is well seized in fee simple, and that he has good right and lawful authority to sell as therein written. That is, that he was so seized as to convey a good title in fee. This covenant being of, or about, title, we must search farther for the distinction intended by the expressions used in the statute.

The whole statute in question seems to have been intended to limit all kinds of actions, or nearly so. Almost all are expressly enumerated. The description in the section, creating a bar to actions of covenant, is so extensive as necessarily to include all possible covenants. And the general enacting clause, if we leave out the exception therein contained, creates a bar in eight years from the time of the accruing of the cause of action; and this would extend to all actions of covenant whatever. Those actions, which come within this exception, are barred in ten years from

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the time of a decision against the title of the grantor ; this, probably, being considered to be the time, when the cause of action would accrue. If the excepting clause had stopped at the word *land*, and, of course, had excepted all actions upon covenants in deeds of conveyances of land, the subject would have been plain, and the distinction plain ; and the only question that could arise, would be, whether the covenant, upon which the suit is brought, is, or is not, in a deed of conveyance of land ? But the exception from the eight years, and transfer to the ten years limitation, rests on a further distinction, to wit, whether it is, or is not, also, a covenant for securing the title of the lands conveyed. The framers of this statute seem to have had in contemplation covenants of both kinds in deeds conveying lands ; else, why did they use the double expression, “in deeds of conveyances,” and “for securing title?” This presents the enquiry, how this exception applies to covenants of warranty, any more than to other covenants in deeds of conveyance ? The terms of this covenant are more like the actual securing title, than those in the other usual covenants. The difference, to be sure, is more in the operation of things, than in the final result. This is the only covenant, the specific performance of which would be literally securing title. Upon either of the others there could be no decree of any act as a specific performance ; all must be the paying of damages for the breach of covenant ; damages because he was not well seized ; or because he had no right to convey ; or because there were incumbrances on the land. The performance of this covenant would be the keeping off all other titles, and keeping the grantee in the quiet enjoyment of the premises. This would be literally securing the title to the grantee. Moreover the legislature may well be supposed to use terms according to their known signification in the common law. The authorities cited by the plaintiff’s counsel, show, that this covenant is the only one on which a *warrantia chartæ* could be founded at common law. That gives it a claim to be denominated a covenant for securing title, above the other usual covenants.

Again, the usual course is, and ought always to be, so to frame statutes of limitations, that they run against a claim, only from the time, when the cause of action is matured, and the party might sue, if he pleased. This should be so ; first, because no person should be barred of his rights, without having first a reasonable time in which he might secure them ; 2d, because no presumption of payment, or settlement, can begin to arise from any neglect to prosecute, until the party has a right of action.

The statute provision, of ten years from a final decision against the title of the grantor, may be considered of the same import as ten years from the time when the cause of action accrued. And yet the legislature may have intended to enact, that an eviction by elder and better title, submitted to without suit, shall not be evidence to entitle the grantee to recover upon his covenant of warranty ; but that the eviction shall be shown by a judicial decision against the title. Such have been the decisions, without reference to this statute. However this may have been, it is evident, that the legislature considered that this section provided a bar to all actions of covenant ; and that all were barred in eight years, except those specific as a different class, to be barred in ten years. Now, it would not be a fair construction of this statute, should we decide, that an action upon the covenant of seizin, which is broken, and may be sued immediately upon the giving of the deed, if ever, may lie dormant, not only eight, but ten, twenty, or even a hundred years, and then an action be maintained upon it.

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It is further observable, that the action upon a covenant of seizin must be brought in the name of the grantee, and cannot be maintained in the name of the assignee. This covenant, being broken at the execution of the deed, becomes a mere chose in action, and cannot be assigned, by any law in force here, so as to enable the assignee to recover upon it in his own name. Such original grantee may commence his suit as soon as he pleases ; and there is no greater hardship in his being barred, if he neglects his rights, than for him to be barred of his remedy upon any other contract. And it makes no difference in the hardship, whether there are other covenants in the deed or not.

If the legislature attached any definite meaning to the expressions they used, they must have intended this distinction ; that those covenants of warranty, which are considered as broken, only by a judicial decision against the title of the grantor, are covenants to secure title, and may be sued at any time within ten years from a final decision against such title ; and that those covenants, which are considered broken without any such judicial decision, of which the covenant of seizin is clearly one, must be sued within eight years from the time of the breach ; that, though such covenants are in a deed of conveyance of land, they are not covenants to secure the title, but only covenants to secure the recovery of damages on account of the failure of title. The statute might have been so framed as to provide, that covenants

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not in deeds of conveyance of lands, and covenants in such deeds, that may be considered broken, without any decision upon the title, shall be sued within eight years from the time of the breach, and not after; and that those covenants, which are not considered broken, till there is a final decision against the title of the grantor, must be sued within ten years from such decision. Had the statute been thus framed, the construction would have been plain and easy. Such is not its language; yet, the things described seem, in other language, to mark out the same practical distinction. The subject matter of this plea in offset, being a covenant of seizin, and the same appearing to have lain dormant more than eight years, the replication of the statute of limitations of eight years is a good and sufficient bar to this plea in offset; and the rejoinder, that there had been no decision against the title of the grantor, is no sufficient answer to this replication; because the breach of this covenant of seizin was complete, without such a decision. This rejoinder would be a good answer to the replication of ten years, if the matter of the plea in offset rendered that replication necessary. But this last replication is, itself, of no importance to the action.

The judgement of the county court, which was in favor of the plaintiff, is affirmed.

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JOHN L. WOODS, administrator of WILLIAM EAMES, deceased,  
appellee, vs. The CREDITORS of said estate, appellants.

An administrator will be allowed his account for expenditures in a law suit, in which he fails to recover, when he acts in good faith, and with reasonable prudence; but he may press on a suit with so little prudence, and so little prospect of recovery, that he ought not to be allowed his costs.

An administrator should be charged with interest on monies he receives for the estate, during the time of any delay of a settlement of the estate, or when he can fairly be presumed to have used the money, or had safe opportunities to have kept the same on interest.

The principal administration being in this state, and the same person being also administrator in New-Hampshire, and not having closed his administration there for a long time, shall be held accountable here, in the first instance, for monies he received in New-Hampshire before he took administration there, and also, for monies received afterwards, for property which he had not inventoried there, and for which monies he had rendered no account there.

An administrator is to be charged with a loss in the sale of real estate, which he might have saved by prudent management; especially when he was interested in the last bid and purchase.

The said *John L. Woods* rendered his account of his admin-

istration before the court of probate for the district of Bradford, and the same was allowed. *Messrs. Skinner and Dewey*, two of the creditors of the estate, were dissatisfied with the allowance of several items of the account, and appealed from the decision of such allowance to this Court. The appeal was entered at the last term, and a commissioner was appointed to take the account, and report to this Court. At this term he returned a full and special report; to some items of which exceptions were filed by each party. These exceptions were argued by counsel. The facts upon each point, decided, sufficiently appear in the opinion of the Court, which was pronounced by

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**HUTCHINSON, C. J.**—It is a matter of regret, that an administrator should be several years settling an estate, without keeping an accurate daily account of his services. The sum charged for services is objected to. The commissioner reports, that no regular account was kept from day to day; but the administrator made up the account chiefly from memory, when he was about to exhibit it to the Court of probate for allowance. This is too loose for allowance, without support from some other source than his memory. Yet the commissioner has reported such supporting facts, and the particular controversies reported show the estate in a situation so embarrassed, and requiring so much time and attention to settle it, we have concluded to affirm the report upon this item of the account. We also affirm the report upon some small items, which may not be exactly as they should be, but the commissioner states them to have been all in good faith. We also affirm the account of sales of personal estate, where the administrator was the highest bidder, and became the purchaser; there being no ground, from the facts reported, to believe the estate injured by his bids. But we charge him with five dollars he gained in selling a sleigh for so much more than his bid for it. We also disallow the sum of \$6,71, paid Mr. Underwood for attending before the court of probate on the rendition of his account, because this was rendered necessary only by his want of regularity and care in keeping his accounts. The commissioner has allowed the administrator his expenditures in several suits, in which there was a recovery against him, and which are of considerable amount. These were objected to before the commissioner, and the objections again urged before this Court. We affirm the decision of the commissioner in all these except one, on the ground, that no blame seems attached to



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him in the business. That one is, the case of *John L. Woods*, administrator of *W. Eames*, vs. Pettes, Tarbell & Co.

It appears by the report, " that said Pettes, Tarbell & Co. presented to the commissioners, appointed on the estate of *William Eames*, their account against said estate, and the administrator presented in offset the claims of said *Eames* against Pettes, Tarbell & Co.; and the commissioners found, and reported, a balance in favor of said estate against said Pettes, Tarbell & Co. of \$4,15, which claim, together with the one first above mentioned, and one other, in favor of the administrator, in his private right, were, by the administrator, handed to Abel Underwood, Esq. of Wells river for collection; that said Underwood, finding a Mr. Gale, a resident at Wells river, was going to Rockingham, the residence of Pettes, one of said firm, made writs on each of said claims, together with one other in which the Administrator had no interest, all justice suits, and handed them to said Gale, with directions to call on said Pettes, and, if he would pay said claims and the additional sum of five dollars for costs, the said Gale was at liberty to discharge said suits; but, in case Pettes declined, then to hand the writs to an officer to be served. Gale called on Pettes, who declined settling the other demands, but offered to pay Gale the balance found by said commissioners, being the claim on which this suit was brought. But it did not appear whether he offered to pay any costs or not. Gale declined receiving pay on one of said demands, unless the whole were settled; and the writ was served on Pettes returnable at Newbury. The declaration was in assumpsit, containing one count for \$4,15, as a balance found due by the commissioners, to which was added a general count for goods sold and delivered. On the trial before the magistrate, the attorney of Woods offered in evidence, in support of his claim, a transcript of said *Eames'* account against Pettes, Tarbell & Co., on the back of which was a certificate, subscribed by the commissioners of said estate, of the examination and allowance of said account, and that a balance was found due said estate of the sum of \$4,15. To the admission of this paper, the attorney for the defendants objected, on the ground that it did not furnish the legal proof of the allowance by said commissioners; which objection was sustained by the court, and the paper rejected. The attorney for the plaintiff then resorted to his second count, and offered the original account of said *Eames* in support thereof, to which the defendants pleaded their account in offset. The plaintiff objected to the allowance of said offset, on the

ground, that the same was barred, because it could have been recovered only by presenting it to the commissioners. The objection was overruled by the Court; and, upon the adjudication of said claims, said Court found a balance of about one dollar in favor of the defendants. From this judgement the plaintiff appealed to the county court, and, on trial there, the plaintiff obtained a verdict for said sum of \$4,15. The defendants then made a motion to dismiss said action, on the ground that the county court had no appellate jurisdiction thereof. This motion proved unsuccessful, when the defendants filed in court a motion in arrest of judgment, on the ground that the plaintiff should have declared in debt, and not in assumpsit. Said cause was continued in said county court, pending said motion, to the next term, at which term, on hearing of said motion, judgement was arrested. The plaintiff filed exceptions to the opinion of the court, and the cause was removed to the Supreme Court, where, after one continuance for advisement, said Supreme Court affirmed the judgement of the county court, and gave costs to the defendants for the two terms in the Supreme Court. The Administrator has charged the estate for costs and expenses in this suit the sum of \$107,-50."

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With regard to this claim, which amounts to something worthy of notice, there seems to be an incorrect procedure in the outset. The sending by Gale, and connecting this with several other demands, and sending writs on all of them, with directions to deliver them all to an officer to be served, unless Tarbell would pay them all, and a sum in gross as costs on them all, was leaving no discretion in Gale to receive the money on this, when offered by Tarbell, unless he paid the whole. The report says, it did not appear whether Tarbell offered to pay the cost in this suit or not. This is not very material, as it would have done no good for him to offer it; for Gale had no right to receive it. Moreover, that had no effect upon the suit, or upon the expenditures in the suit, now claimed by the administrator. The recovery by Tarbell & Co., was upon entirely different grounds from that. It was said in argument, that Gale's instructions were the work of the attorney. For this purpose the doings of the attorney were the same as if done by *Woods* himself. As *Woods* owned one or two others of the demands, probably his views were known to his attorney; but that is an affair between them, and could not affect the suit. That suit was unnecessarily and improperly brought before the justice for trial. Again, when the plaintiff was beaten before the

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justice, it was very imprudent for him to appeal the cause. His claim was but four dollars and fifteen cents ; and, if he had recovered he could recover no more costs than damages. And no possible recovery, allowed by law, would prevent his being a loser by the appeal. And the going off of the action upon another point afterwards, makes no difference ; for the after costs could not have been recovered in any event whatever. We think this suit so entirely unnecessary, and the management of it attended with so little prudence, it would be wrong to make the estate of the deceased pay this cost. The allowance of \$107,50 must be deducted.

The commissioner has allowed the sum of ninety dollars against the administrator, as money which he might have realized in the sale of real estate, under his licence from the probate court above what it was sold for. The circumstances were these, as reported by him : The real estate consisted of a store at Wells river, in Newbury, appraised " by the appraisers, appointed to appraise *Eames'* estate, at the sum of six hundred and fifty eight dollars. The administrator has credited the estate the sum of \$410,00, as the avails of said estate. The appellants contend, that the administrator should be charged with the full value of said real estate, because, as they say, he had a secret bargain with the auctioneer for him to bid it off for their joint benefit ; and, as they say, it was sold at a sacrifice in consequence. The facts are as follow : the administrator caused due notice of the sale of the real estate to be given, by posting up notifications in the public places in the town, and in the adjoining towns, about one month before the sale, which was advertised to take place on the first of December, 1829 ; and, on that day, the administrator caused the real estate to be offered for sale at public vendue, the terms cash in thirty days from the sale. The administrator employed Roswell Shurtleff as auctioneer, in the sale of said estate. The said store was offered for sale in the forenoon of said day ; the administrator having advertised personal property of his own, in which the estate had no interest, to be sold at the same time ; and there was a considerable collection of people present at the sale, which took place in the same building then offered to be sold. The administrator had a private understanding with one Walter Robin, to bid for him, the administrator, a sum not exceeding \$375, or \$400. Robin bid several times. The store stood at \$350 ; when an adjournment was had for about two hours ; and it was then again offered. Messrs. Shedd, White and Hutchins, all living at Wells

river, two of whom were merchants, and the other a dealer in paper, books, &c., were desirous to purchase the store, and had a private understanding with each other ; that White alone should bid, who was authorized to give five hundred dollars, in case he could not buy at a less sum. White testified, that he went to the vendue intending to bid as high as \$500, in case he could not purchase for less ; and Hutchins testified, that it was his impression a still higher sum was spoken of. After the postponement, and before the sale recommenced, the administrator privately proposed to Shurtleff, the auctioneer, that he, (Shurtleff,) should bid in the estate, for the joint benefit of said administrator and himself, at a sum not exceeding five hundred dollars. Shurtleff declined this proposal, but agreed to purchase said store for the mutual benefit of said *Woods* and himself, at a sum not exceeding \$450, in case no one bid higher. The administrator states, that his motive in making this arrangement with Shurtleff was, to prevent a sacrifice, as he suspected a combination between Shedd, White and Hutchins. About the time the sale recommenced, Shurtleff said to Robin, "you need not bid any more : I am going to bid." After several bids, Shurtleff, the auctioneer, bid \$410. At about fifteen minutes before four o'clock, Shurtleff took out his watch, and gave notice, that the store then stood on him at \$410 ; that, if no one bid by four o'clock, he should strike it off. At four o'clock, no one having bid, he gave five minutes more, and no one bidding, at the end of the time he struck off the store to himself, at \$410. Both White and Hutchins were present in the store during the bidding, and both testified, without contradicting the facts above stated, that the store was struck off at a time when they did not expect it ; and that White intended to have given more. Hutchins also testified, that White did not bid as promptly as he expected ; but, for some reason seemed to hold back. After the store was struck off, *Woods* declared, that if any one present would give any thing "worth while," in addition to the sum, for which it had been struck off, it should be set up again : and Shurtleff declared, it is up again for a decent bid. Immediately after, and as the company were about retiring from the store, (a sale of horses being about to take place at the door,) White enquired of Shurtleff what sum would be called sufficient for a bid, to cause it to be set up again ? Shurtleff replied, fifty dollars ; and White understood, that a bid for a less sum would not be received. To this White made no reply. While the said store was up at auction, and during the bidding, *Woods* gave notice, that he

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should convey the same title, and no other, that *William Eames* had at the time of his death. At an after day, before *Woods* had conveyed to *Shurtleff*, and more than thirty days after the sale, *White* called on *Woods*, and offered him fifty dollars, in addition to the sum of \$410, for the store. *Woods* declined, saying he was under obligation to deed to *Shurtleff*. There was no evidence of the value of said real estate offered, other than the appraisal and the sale at auction, except the following: It appeared that *William Eames* bought the store of his brother *Thomas Eames* in January, 1820, at \$542, payable in goods at 25 per cent. advance on the cost and freight; and that *William Eames* made repairs, afterwards, at an expense of about \$260. It also appeared, that Messrs. *Shedd* and *Tracy*, merchants at *Wells river*, offered to hire the store for four years at a rent of eighty dollars per year. *Woods* referred them to *Shurtleff*, who declined the offer. There was no evidence that *Woods* ever offered the store to any one at private sale. From the foregoing facts, the commissioner is of opinion, without imputing to the administrator a fraudulent intent, further than is apparent from the facts disclosed, that he might, with due diligence, have sold said real estate at the sum of five hundred dollars, and having himself, jointly with another, become the purchaser, at \$410, he ought to be charged with the difference. And he has accordingly charged him the further sum of ninety dollars."

We have dwelt upon this disclosure once and again, and find ourselves unable to make any thing of it more favorable to the administrator, than the commissioner has done. The property went at great discount from its cost, and from its appraised value. And it appears certain, that five hundred dollars might have been obtained for it. We have endeavored to give the administrator all reasonable benefit from his being ignorant, that there were those present, who would give that sum. But, when we see, that he had a person by, bidding for him; that he was interested in the final bid, when it was struck off; that he does not appear ever to have offered to sell at private sale, and that he announced, during the bidding, and when there was little or no opportunity to examine title, that he only sold such title as the deceased had at his death, we think he ought to be charged with the ninety dollars reported against him.

The commissioner has reported a demand against *Dorman Young* of \$46,91, which he treats as not collected, and leaves to come in at a future settlement. But the report shows, that this

demand has been collected, pending this appeal; and he had changed the securities before that time. We decide that he shall be now holden to account for it. He should account for all the monies received to the time of final accounting. The Court will take care, that monies, received pending the appeal, shall have no improper effect as to cost.

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The commissioner has reported the sum of \$195,05 collected by the administrator, after his appointment in this state, and before he was appointed administrator of the same estate in New-Hampshire; also a further sum of fifty-four dollars, and ninety-two cents, collected of people in New-Hampshire, since his said appointment there, which was December 16th, 1828. Neither of which sums have been inventoried, or in any way accounted for in New-Hampshire. The administrator seems not to have attempted to show, that any debts have come against the estate of the deceased in New-Hampshire. Under these circumstances, and considering the length of time since both administrations have been pending, and no account rendered in New-Hampshire of those monies received for debts there, we make him debtor for them in his present account. After he shall have closed his administration in New-Hampshire, he must account here for the balance of monies received there. If no debts come against the estate there, he must account for the whole here. More than three years have elapsed, since that administration has been pending; yet it is not closed, nor is there any reason shown, why it is not closed, nor any reason shown, why he should not account for the money here, without the ceremony of its passing the probate office there. And he has rendered no account of it there; not even an inventory to show, that he had it in his possession. Moreover, his accounting here secures him against all persons, except creditors living in New-Hampshire. He tells of no such creditors; and the creditors here have good right to claim their dividend of this money. These sums must be added to the fund in the hands of the administrator.

We have considered the subject of interest also; and have observed the sums and dates of the accounts; and, to avoid mistakes, have prepared a plot to deliver to the clerk. The principle we adopt is this: We cast interest on the balance in his hands on the first of January, 1829, till the 30th of March, 1830, the time when he rendered his account, upon which this appeal was taken. We cast from January, 1829, because he had been administrator more than two years, and this balance had then become money in his hands. We find considerable sums credited

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between said first of January, 1829, and the first of December, 1829. We cast interest on this sum from said last date to said 30th of March, 1830. On some large sums, received afterwards, interest is to be cast from the time of receiving till said 30th of March, 1830. When we have found the balance in his hands at said 30th of March, 1830, when he rendered his account before the court of probate, we cast interest on that to the present time. This we deem just; because he knew the money could not be called out of his hands pending the appeal; and he can have had no difficulty in keeping this balance drawing interest in the mean time.

With the alterations now suggested, and the addition of interest, now directed, the report of the commissioner is accepted and confirmed; and directions must go to the probate court to strike a dividend of the sum thus found and established in the administrator's hands.

*P. Burbank*, for appellants.

*Matlocks & Underwood*, for administrator.



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### SAMUEL MORRISON vs. DANIEL MOORE.

A motion to dismiss an action, originally commenced before the county court, on the ground, that the plaintiff's proof does not entitle him to recover over one hundred dollars, is a motion addressed to the discretion of the Court, and ought not to be granted, unless it be clear, that the plaintiff has no fair pretext for claiming over one hundred dollars.

This case came up from the county court, for a hearing upon the following bill of exceptions, allowed by said county court:

“*Assumpsit* for work and labor. Plea, *non assumpsit*. It appeared on trial, that in March, A. D. 1827, the defendant, who was a relative of the plaintiff,—was at the house of the plaintiff's father in Canada,—when it was agreed that the plaintiff, then about eighteen years old, should go to live with defendant, and, by his labor, pay a debt of about \$30,00, due to the defendant from plaintiff's father; and afterwards, if plaintiff chose to stay and work for defendant till he was twenty-one years old, and defendant chose to keep him, it was stipulated, that defendant was to give him three months schooling each winter, cloth him decently during the time, and, at the expiration of his service, pay him one hundred dollars, together with two suits of clothes, such as are usually denominated *freedom suits*. It was understood, that, after paying the debt of \$30, 00, the plaintiff was to have the sole benefit of his labor for defendant. And there was evidence tending to show, that the plaintiff was to be at liberty to stipulate for himself



as to his said service. One witness, called to prove the declarations of the plaintiff as to the contract, understood him to say, that the \$30 was to be deducted from the \$100. And others, whose depositions were in evidence, and who professed to have heard the original agreement, understood the \$100 to be exclusive of the \$30. It was proved, that plaintiff went with the defendant to his house in Barnet, in March, 1827, and lived with him till some time in September, 1828; after which he worked one month for a Mr. Strowbridge, who paid defendant \$8 for his wages. Evidence was given tending to show, that defendant schooled the plaintiff about three months in the winter of 1827—8; that his clothing was rather cheap and poor while he lived with defendant, and that he laboured with ordinary diligence and fidelity, in the service of defendant, during the whole period aforesaid, except when in school as aforesaid, and was generally reputed a middling hand. There was no evidence of any new agreement between the plaintiff and defendant, nor did it appear, that defendant consented to the plaintiff's going away, nor that he expressly forbade it, or claimed to have him remain in his service. The evidence being closed, the defendant moved the court to dismiss the action for want of original jurisdiction in this court; but the court overruled the motion, and the cause was committed to the jury, who returned a verdict in favor of the plaintiff for \$50 damages and his costs. And, to the refusal of the court to dismiss said action, the defendant excepts. Exceptions allowed and passed to the Supreme Court, and execution stayed."

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*Fletcher and Chandler, for the defendant.*—On the strongest view, in which the case can be taken for the plaintiff, it is contended, the county court had not jurisdiction, and that a justice of the peace had; the damages not exceeding, by the plaintiff's showing, one hundred dollars. By an act passed November 5, 1801, it is enacted, that the several county courts shall not hear, determine, nor adjudge on any action or suit, which is originally made cognisable before a justice of the peace, unless entered by appeal, &c.—(Stat. 91.) By an act passed November 15, 1821, it is enacted, that every justice, within his proper sphere of jurisdiction, be authorized to hear, try and determine, all pleas, &c., where the matter in demand did not exceed one hundred dollars.—Stat. 139. What is the debt or other matter in demand, which gives and takes away jurisdiction? and how is the amount to be ascertained? The nature of the case must guide and direct the court, or it is in the power of the plaintiff to give jurisdiction and take it away from the court. In actions of slander, trespass, assault and battery, &c., the amount of damages is discretionary, and necessarily uncertain. But in covenant, debt, trover, assumpsit,

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and the like, the damages are ascertained by computation. They are not arbitrary. The law fixes a rule. The legal cause of action, the value of the thing put in demand, is to be regarded as giving jurisdiction. To ascertain this, we must recur to the matter in dispute. The matter in dispute was the compensation, which the plaintiff ought to receive for the time, which he had worked for the defendant, in fact, after he was solely entitled to receive the pay, not the time stated in the declaration, of which the plaintiff had no proof. A compensation for services actually rendered is the matter in demand, and necessarily furnishes the criterion to be resorted to in settling the question of jurisdiction. The \$8, we lay out of the case, because the defendant was entitled to the plaintiff's earnings as long as he was in his employ. It can no more furnish a rule for estimating the value of plaintiff's labor, than if the ground upon which he worked for defendant produced good crops. The clothing and schooling we lay out of the case, because the plaintiff does not count upon that portion of the contract in his declaration. Had the plaintiff labored until he was twenty-one years of age, and received no schooling nor clothing, he could not recover damages in a count for labor done and performed; but it must have been a special action upon the contract. The \$30 must not be taken into the computation. That part of the contract was in the right of the father; and the son, by express stipulation, was to pay that sum, before he was to be entitled to any of his earnings. It is evident, then, that the son cannot bring that into his account against the defendant. The contract entered into with the father, at all events, was in force until the thirty dollars was paid. It necessarily governs the *pro rata* of the son's labor to the amount of that sum. But the father was competent to contract at the time he made the contract for the son's labor with the defendant. That contract was in force, until rescinded by competent authority. This contract could only be rescinded by the father or some one empowered so to do by him. If the father delegated this power to the son, until it was exercised, the first contract was in force, and whatever the parties did was under that contract. But the plaintiff did not exercise this delegated power; nor did he attempt to act in his own right to put an end to the contract made with his father. The case states, that there was no new agreement; and, when the plaintiff left the employ of the defendant finally, the defendant neither assented nor dissented. The labor for the defendant was performed under the contract made with the father and no other. There

could be no implied contract so long as the express contract existed. Had the plaintiff remained with the defendant, until he was twenty-one years of age, he would have lived with him three years. Had there been no new contract, the defendant would have been under obligation to cancel the debt of \$30 against the father, give the plaintiff three months schooling each winter, two suits of clothes, and one hundred dollars. But the plaintiff remained in the defendant's employ but nineteen months, including the month he worked for Strowbridge. Had the plaintiff continued with the defendant, under the contract made with the father, till he was twenty-one years old, he would have been entitled to nine months' schooling, which, deducted from the three years, leaves two years and three months for labor. Deduct the three months schooling from the time the plaintiff was in fact in the defendant's employ, and it leaves one year and four months of actual labor. But the father was owing \$30 to defendant. This was to be paid, at all events, before the plaintiff would be entitled to any of his earnings, upon his own showing. The service actually rendered, then, is the balance of sixteen month's labor, after deducting the thirty dollars. This is the matter in demand. This is the value of the thing in dispute. The contract entered into with the father not having been abrogated, the rights of the parties must be governed by that. This contract furnishes a rule of computation. It is not uncertain and indefinite, like trespass, assault and battery, slander, &c. ; but furnishes as definite a rule as the interest table. In short, analysis settles the question. Had the term of service been completed, under the contract with the father, the time computed for actual labor would have been twenty-seven months. One hundred and thirty dollars for twenty-seven months, is \$4,81 per month. At this rate it requires six months and one fourth of a month to pay thirty dollars due from the father to the defendant. Deducting six months from the sixteen months, the time the plaintiff actually labored for the defendant, leaves nine months and three fourths of a month to be accounted for by the defendant. This amounts to \$46,90. But the jury have seen fit to estimate the balance at fifty dollars. Either sum is conclusive of the jurisdiction of the court. The doctrine contended for in this case is not new. It has been repeatedly ruled in the Supreme Court of the United States.—*Wilson vs. Daniel*, 1 U. S. Rep. 185 ; *U. S. vs. Mc'Dowell*, 2 do. 122 ; *Cooke vs. Wardrow*, do. 174 ; *Wise vs. Turnpike Co.* do. 487.

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*J. Matlocks, for the plaintiff.*—1. The contract was, that the plaintiff should work for defendant to pay his father's debt of \$30, and afterwards to have his own earnings. The contract about staying until he was *twenty-one*, was, in case they both agreed. They did not agree : therefore, the bargain dropt, and plaintiff was entitled to what he earned. He labored from some time in March, 1827, until some time in September, 1828 ; and one month after with Strowbridge, for defendant. The time, if all March and September is included, is one year and eight months ; or, if half of those months is included, one year and seven months. Deducting the first three months, to pay about \$30 for his father's debt, being about \$10 per month, leaves about sixteen or seventeen months' labor, the plaintiff going to school about three months in the winter ; and, if these three months are deducted, still leaves thirteen or fourteen months' work, during the best part of two seasons. Now, who can say that this labor was not worth over \$100, even if plaintiff's clothing, which was rather cheap and poor, was furnished by defendant, (which does not appear,) and, if the value of it is to be first deducted, in order to get at the jurisdiction, (which we deny,) when it is well known, that, in this country, from \$120, to \$150 is the price of a hired man for one entire year ? No testimony was put in, showing the value ; and the court cannot presume it. Besides, the value of the clothing will not affect this question. 1st. Because the case does not show, that defendant furnished any clothing. 2d. If he did, defendant might not have defended the suit ; or might not have set up this deduction from the wages, and afterwards sued plaintiff for the clothing, as there was no testimony, that any clothing was received by plaintiff, in payment for his labor.

2. Why was not plaintiff's whole labour of twenty months, the "debt or matter in demand," subject to be reduced, or lessened, by the application of the \$30 against so much of the work as was worth that sum ? This not having been done by the parties, why is it not like a note of \$150, \$50 of which has been paid, but not endorsed ; or rather fifty bushels of wheat having been paid towards it, the price not agreed on ? The unsettled and unliquidated dealings of the parties have certainly been over \$100 ; and, whatever the balance due might have been, the plaintiff is entitled to a superior court to decide upon these demands. It is not the policy of the law to permit a single justice to overhaul large dealings, and render judgement for \$100, the wrong way, and thereby injure the losing party \$200.

3. The most courts have ever done in dismissing actions for want of jurisdiction on trial is, when the claims are clearly out of their jurisdiction ; as for a particular sum of money ; or for the value of goods or services, where all the plaintiff's witnesses swear the value below the county court's jurisdiction ; say an action of trover for a horse or cow ; if all plaintiff's witnesses said the animal was worth less than \$100, the court might dismiss ; but if any one put the value over, although all others for plaintiff and defendant said less, they would not dismiss. And, probably, even in so clear a case as of a middling good cow, the court would not decide upon the value and dismiss without proof : but certainly in the case of a middling good horse, they would not hear themselves called upon to put a value. Much less would they put a value upon 13, 14, 17 or 20 months' work, a minor's going to school "about three months," or a "few cheap and poor clothes." They cannot judicially guess out the facts, and then value labor, without proof of its demand and price, at the time and place, when and where performed.

4. Then, if plaintiff's rule of damages should have been predicated upon what he was to have had, if he had stayed until he was *twenty-one*, yet the court cannot decide, that plaintiff, for the time he did stay, was not entitled to over \$100. For, 1st. plaintiff's age is not shown. "About eighteen" is too indefinite. 2nd. How much less than decent clothes were furnished during the time he stayed. 3d. Plaintiff might have been sick all the remainder of his time, and been chargeable, and not serviceable, to defendant. 4th. What is the value of "two freedom suits." It is said, that, in a plea of usury, the per cent. must be stated, as well as the facts, for the court are not to be called on to make the cast, to see that the interest is unlawful. But here the court are called on from uncertain facts to estimate value without proof ; and this to oust the county court of their jurisdiction.

5. It is rather a matter of discretion in the county court, upon the whole facts before them, to decide, whether they will dismiss. If the suit is brought in good faith, to try a right and not to enhance cost, they will be slow to dismiss ; and this discretion is scarcely revisable by this Court, and, if it is, this is a strong case for plaintiff. 1st. It was at least doubtful. He thought he ought to have over \$100, and he might well go before a court, which could give it. 2nd. The plaintiff was a minor. 3d. Defendant never interposed this objection until the third term, and on final trial.

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HUTCHINSON, C. J., delivered the opinion of the Court. The only question presented in this case is, whether the county court ought to have dismissed this action, on the ground, that the sum in dispute, or matter in demand, did not exceed one hundred dollars. There is some difficulty in many cases of uncertainty in point of value of property sued for. Suitors may entertain doubts, to which court they ought to apply for redress of what they deem their wrongs. There was an uncertainty in this case, with regard to the value of the labor, performed by the plaintiff, of which the defendant had the benefit, and the value of the clothing, to which the plaintiff would have been entitled, at the age of twenty one years, had he tarried till then, and from the furnishing of which the defendant was discharged by the plaintiff's not tarrying his whole time contracted for. And the case presents no reason for any diminution from the plaintiff's earnings, while he did continue in the defendant's employ, arising from any unwarrantable breaking off the contract. Amidst these uncertainties, the court might form but a vague conjecture, at what sum the jury would assess the plaintiff's damages. This motion was addressed to the discretion of the court; and it was their duty to exercise a sound discretion, and not dismiss the action under such circumstances, as would endanger the plaintiff's rights, and leave him liable to a similar rebuff, should he commence his suit before a single magistrate. The defendant received eight dollars for one month's labor of the plaintiff. He may have thought nearly all his labor of a similar value by the month. And others, with whom he conversed, may have thought so too. Yet this would be no rule for the decision of the court, any further than these circumstances would show the action brought in good faith, and the jurisdiction selected in good faith, and not from the motive to enhance cost. In this case there is something more. There is reason to believe, that the defendant considered the jurisdiction well selected; for there have been two or three trials in this case; and this motion to dismiss comes on the final trial before the jury. It ought not to prevail, unless it were first rendered very certain, that the plaintiff's claim would admit of no fair pretence of its amounting to more than one hundred dollars. The verdict found by the jury can furnish no rule for a decision of this question. The jurors may have differed widely from each other, and this verdict may have been the result of a compromise. This verdict no more shows, that the county court had not jurisdiction, than a verdict of one hundred and ten dollars, in a suit before a justice

of the peace, would show that such justice had no jurisdiction. In such case, the damages being in their nature uncertain, the plaintiff might remit all over \$100, and have execution for that sum.

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Another difficulty is slightly suggested by the plaintiff's counsel. This cause comes up before this Court, as upon a writ of error. We can review the decisions of the county court upon all questions of law, arising upon facts found, or agreed upon by the parties, and placed upon the record by a bill of exceptions. If it appeared of record, that the plaintiff produced no testimony tending to show greater damages than fifty dollars, whether that appeared by the declaration's comprising no greater sum, or by the exceptions stating the amount placed in controversy, we could reverse their decision, if we find it incorrect. But, when the county court decide upon the weight of evidence merely, we cannot revise their decision. In the present case, the motion to dismiss virtually called upon the court to weigh the evidence, and decide, that the plaintiff, should be recover, had no fair pretence of recovering over one hundred dollars. Their decision depended wholly upon the weight of evidence. If they had found the fact, that the plaintiff had no fair pretence to claim over one hundred dollars, and placed that finding upon the record, and yet had refused to dismiss the action, we should be able to revise their decision and affirm or reverse it, as the law required. This they have not done. They have reported a chain of facts proved, which stand as evidence, from which to infer the further fact of the sum which the plaintiff might have a plausible claim to recover. And their decision upon the same question shows their inference to be, that the plaintiff had a plausible pretext to try to obtain a verdict for more than one hundred dollars.

The judgement of the county court is affirmed.

*Fletcher & S. A. Chandler*, for defendant.

*J. Mattocks*, for plaintiff.



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CHESTER W. BLOSS vs. JOSEPH W. KITTRIDGE.

The statute of 1811, allowing a review in certain appealed causes, is not repealed by the statute of 1826, which purports to take away the right of review in appealed causes.

The defendant's filing in offset, in an appealed action, matters of which the county court might take original jurisdiction, renders the action open to a review in the county court.

This was an action, brought before a justice of the peace, in which the defendant recovered judgement, without filing any plea in offset. The action was brought upon a note of about seventy-seven dollars, made payable to one John Beckwith or order, and by him indorsed to the plaintiff. The cause was carried, by appeal, to the county court; and the defendant there filed in offset sundry matters against said Beckwith, in four counts, of one hundred dollars each, some of them on the warranty of a horse. The defendant again recovered judgement in his favor; and the plaintiff prayed for a review, which was not granted. He then filed exceptions to this decision, refusing the review, and brought up the cause to this Court for a hearing upon that question. Particulars in the detail of facts sufficiently appear in the arguments, and in the opinion of the Court.

*Argument in behalf of the plaintiff.*—1st. The defendant has pleaded four pleas in offset, of \$100, 00 each, and, in the close, prays to have said sums set off against the plaintiff's claim. Any one of the several counts is over \$100, as that sum was given for the horse, which was of no value, and soon after died; and the demands were, therefore, not within the jurisdiction of a justice; and were considered so by defendant's counsel, as those claims were not pleaded before the justice.

2nd. And, whether defendant could recover against *Bloss*, or against Beckwith, in this suit, is of no consequence. The defendant having filed the claims, it is not for him to say, that he claimed what the court could not give him.

3rd. The jury could have found the defendant's whole claim against Beckwith; for, otherwise, the defendant would lose the difference between the note and his claim; for it would not be competent for the jury to sever the claims. They should have found the whole amount against Beckwith, and offset against *Bloss* enough to meet his demand.

4th. Suppose those counts had been in suit before the county court; would not that court have jurisdiction? If the offset is

within the original jurisdiction of the county court, then the cause is reviewable.

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*Argument on the part of the defendant.*—This is *assumpsit* upon a note, executed by defendant to John Beckwith, and endorsed to plaintiff. Plea,—1. *General issue*. 2. An offset, in several counts, against the payee of the note, counting upon a warranty of a horse, for which the note, declared upon, was given in part consideration; adding the common and general counts: to which the plaintiff pleaded the general issue. The horse died upon the fourth day after the warranty; and the defendant claimed the value of the horse mentioned in his pleas in offset. The witnesses, called to prove the value of the horse, estimated him at less than \$100, varying from \$75, to \$95. The jury returned a verdict for the defendant, being instructed by the court, that, though they should find the value of the horse exceeded the amount of the note, they could not return a balance as against the plaintiff, the endorsee of the note. The plaintiff moved for leave to review the case; but the court refused the motion; to which the plaintiff excepts. 1st. The statute, entitled “An act, allowing endorsees to maintain actions in their own names,” allows the defendant the privilege to plead in offset all demands, proper to be pleaded in offset against the original payee, had the action been brought in his name.—*Stat. p. 144*. 2nd. The statute entitled, “An act, in addition to an act, entitled an act, constituting the Supreme Court of judicature and county courts, defining their powers and regulating judicial proceedings,” allows, that, whenever any civil action shall be appealed from a justice of the peace to the county court, and the plaintiff is indebted to the defendant, the plaintiff may plead the same in offset in the same manner as if the action had originally been commenced in the county court, and had been within their jurisdiction. And, whenever the demand, so pleaded in offset, shall be within the original jurisdiction of the county court, either party shall be entitled to a review.—*Stat. p. 104*. The statute, entitled “An act, defining the powers of justice of the peace within this state,” declares, that all civil causes, brought before the county court by appeal from justices’ courts, shall, by said county courts, be heard and finally determined, without any appeal or review.—*Stat. p. 125*.

Of the right of the defendant to plead in offset to this action, there can be no question; nor is there any exception to the charge of the court taken. The only point to be settled is, was

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the plaintiff entitled to a review in consequence of the defendant's offset? The statute, defining the powers of a justice of the peace, would be conclusive upon the question, were it not for the statute, made in addition to an act, constituting the Supreme Court of judicature and county courts, and regulating judicial proceedings. If, by that statute, the plaintiff is entitled to a review, the court will grant a new trial. But the plaintiff's case is neither within the letter, nor spirit, of that act, for two reasons: 1st. That act extends only to cases where the plaintiff is indebted to the defendant by bond, bill, note, &c., and not to cases, contemplated by the provisions of the act, allowing endorsees to maintain actions in their own names. The offset here pleaded is against John Beckwith, the endorser of the note declared upon, not against *Chester W. Bloss*, the endorsee. 2nd. It is not within the reason and spirit of the statute. If the action had been brought in the name of the payee of the note, he would not be entitled to a review, unless the demand, pleaded in offset, was such as was within the original jurisdiction of the county court. Though the defendant declares in several counts in offset, it is but one plea, and evidently upon but one cause of action; to wit, the warranty of a horse. This is the only matter in dispute; this is the demand in offset. The ascertained value of the horse is what gives, or takes away, jurisdiction; not the mode of declaring. The law permits the plaintiff to declare in different ways, so as to meet his testimony; not for the purpose of enlarging or circumscribing the jurisdiction. If the court have not jurisdiction in *fact*, they cannot take it by *fiction*. To ascertain the value of the horse in this particular case, recourse may be had, either to the opinion of the witnesses, who testified to that fact, or to the opinion of the jury. The witnesses vary in their opinion from \$75, to \$95; no one exceeding \$100. If we have recourse to the verdict, the legal inference is, that the value of the horse was as much as the amount of the note and interest: the court are not at liberty to presume, that it was more.

In the case of *Wilson vs. Daniels*, the matter in dispute was ascertained by recuring to the foundation of the original controversy. The rule then adopted was, when the law gives the rule of damages, the legal cause of action must be regarded.—2 *Dal. Rep.* 360, n. (1 *Pet. Cond. Rep.* 188.) In *Williamson vs. Kincaid*, (4 *Dal.* 20) the court permitted affidavits to be read, to ascertain the value of the property. In *U. S. vs. the Brig Urian*, the Court heard testimony *viva voce*. *Tower vs. Haled*, 1 *Pet. Cond. Rep.* 188, nts. In *Wise and Lynn vs. the Colum.*

*Turnpike Co.* the court decided, that, if the sum awarded be less than \$100, the court have no jurisdiction, though a greater sum be claimed. This case establishes the doctrine, that it is the amount of the verdict, which gives jurisdiction, and has since been followed.—2 *Pet. Cond. Rep.* 489.

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HUTCHINSON, C. J., pronounced the opinion of the Court.— In deciding, whether the plaintiff was entitled to a review, as he claimed to be, it is necessary to compare various statutes upon the subject of reviews, and ascertain how they will stand together. Before the statute of 1811, which will be noticed in its order, the several statutes, then in force, contained the following provisions ; to wit : offsets might be pleaded before a justice of the peace, of matters within his jurisdiction, and go up with the action to the county court, by appeal : or they might be newly pleaded before the county court, after the appeal was entered there. But no offset could be there pleaded, of any matter, which might not have been pleaded before the justice, as being within his jurisdiction. And no review could be had in the county court, of any cause, which came there by appeal. But either party might once review any action originally commenced before the county court. And the statute, which regulates the negotiability of notes, (see page 144,) provides, that the signer of any such note may plead in offset, against the indorsee, all demands, proper to be pleaded in offset, which he may have against the payee before he is notified of the indorsement. At that period an action upon this note of \$77, must have been brought before the county court ; it being then above the jurisdiction of a justice of the peace. If so brought, and this offset filed, either party might have once reviewed the action.

The statute of 1811, (see page 104,) provides, that, in actions, appealed from a justice of the peace to the county court, if the plaintiff is indebted to the defendant by bond, &c., the defendant may plead the same in offset to the plaintiff's demands, in the same manner, as if the action had been originally commenced in the county court, and had been within the jurisdiction of the same ; and, when the demand, so pleaded in offset, is such, as is within the original jurisdiction of the county court, either party has the same right to a review, which he would have had, if the suit had been originally commenced before the county court. With all these statutes in force, the assignment of this note by Beckwith to *Bloss* could not take away the right of *Kittridge*, the signer of the note, to plead in offset any demands, against Beckwith, which

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would be pleadable in offset if the suit were in the name of Beckwith ; nor take away his right of review, after a decision against him. And, by the several statutes, the right of review, if it exist at all, is mutual : the plaintiff might review as well as the defendant.

This leads us to consider, whether the defendant's pleas in offset are such, as would entitle either party to a review, under this statute of 1811, supposing this statute still in force. This must depend upon the amount claimed in these pleas. The defendant has alleged a breach of each promise in his several pleas, without adding the *ad damnum* in any technical form ; but, instead of it, has prayed that the said sums may be set off against said note according to the statute in such case provided. These four counts exhibit a claim of four hundred dollars ; that is, one hundred dollars in each count. We may conjecture, that his declaring for \$100, for the unsoundness of one black gelding, and the same sum for the unsoundness of another black gelding, and a like sum for money had and received, and a like sum for money laid out and expended, are different ways of declaring, yet mean a recovery for the same thing ; yet nothing could prevent the defendant's recovering the whole amount of each count, with sufficient proof of their truth. Here, then, are put together into one declaration in offset, what would extend to the utmost bound of a justice's jurisdiction in four actions. Decisions have settled the law, that several small notes, amounting together to more than one hundred dollars, when joined in one declaration, give jurisdiction to the county court. Six notes of twenty dollars each may present such an action. This plea is, in form as well as substance, a plea in offset. As to its form, it *should* begin and end as a plea in bar ; and the reasons of the bar should be, that the payee of the note was and is indebted to the defendant, &c. See this point decided in the case of *Martin vs. Trowbridge and Runnells*, 1 *Vt. Rep.* 477. Without regarding the form, the substance of the plea is within the original jurisdiction of the county court ; and there is nothing now before us, showing any part of this plea to be fictitious ; and, if there were, the defendant must not be permitted to object to a review on that account. This would come with more propriety from the other party. This leads to the conclusion, that, if the statute of 1811, before noticed, is considered to be in force, this review ought to have been allowed.

If that statute has been repealed, it has been by virtue of the contrary provisions of the act of 1826 ; where it is provided, that no

review shall be allowed in any action, brought to the county court by appeal. This, it will be perceived, includes pauper cases and probate cases, as well as appeals from a justice of the peace. The statute of 1797, contained precisely the same provision, with regard to cases appealed from a justice of the peace : but the act of 1811, being of later origin, there was no interference, but the latter had its effect to govern the cases which came within it.

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The question is now presented, whether the provisions of this statute of 1826 are contrary to those of the statute of 1811, or whether those may not be in full force to govern the particular cases not named in any other statute. There have been several decisions, which furnish analogous principles to aid our deliberations upon this point. The case of *Baker vs. Blodget*, reported by *Judge Aikens*, was an action brought before a justice of the peace upon a demand so small as not to be appealable. The defendant filed in offset a demand large enough to be appealable. He recovered a judgement against the plaintiff, who appealed to the county court. On the defendant's motion, the court dismissed the appeal. The plaintiff brought a writ of error, and this Court reversed the judgement. It was considered as having become a different action, by the addition of the offset ; or rather both together formed the action. Afterwards the parties referred this action, and all demands, to referees, whose report settled the merits of the controversy. This again was considered as making a new action, in reference to the taxation of costs in favor of the plaintiff, who was otherwise curtailed in his costs by his having appealed the action. When new matter is brought upon the record by a plea in offset, the action ceases to be the same action, that it was before.

The statute of 1826 refers to such actions, as can by law come to the county court by appeal. Such offsets as might be filed before the justice, whether they be filed there, or in the county court, do not render the action liable to a review in the county court. But those, which cannot come to the county court by appeal, in the shape they assume under the provisions of the act of 1811, when that shape is given them, cease to be governed by the act of 1826. In other words, an action brought to the county court by appeal, and having an offset filed there, which could not be filed, were it not for the act of 1811, is open to review by virtue of that act ; and its provisions are not repealed by the later provisions of the act of 1826. The two statutes are to be considered as referring to different subjects.

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Kittridge.

It is suggested in argument, by the defendant's counsel, that this offset should be considered as of no greater amount, than the plaintiff's demand, because no greater sum than that can be allowed in this action. It is true, let the offset be ever so large, when filed against the indorsee, its legal effect is only to bar the plaintiff's action. But that does not render the offset such as might have been pleaded before a justice of the peace, or such as could not have been originally cognizable before the county court. Upon this mode of reasoning, there could be no offset filed by virtue of the statute of 1811; for that statute requires the action to have come into court by appeal from a justice of the peace; and, of course, must be considered as within the jurisdiction of such justice. It also requires the offset to be one, which could not have been filed before the justice—one out of his jurisdiction. The plain provisions of the statutes ought not to be thus evaded.

Upon the plaintiff's entering bail, before this Court, to prosecute his review before the county court, there may be entered a reversal of the judgement of the county court, and the grant of a review in the action.

*J. Mattocks, Cushman & Burbank, for plaintiff.*

*Fletcher, Shaw & Chandler, for defendant.*



#### WILLIAM SOMMERS vs. ALEXANDER JOHNSON.

CALEDONIA.  
March.  
1832.

The statute of 1830, authorizing the county courts to grant relief to persons, imprisoned on execution for torts, is a constitutional statute, and extends to persons in prison when the statute passed.

*Johnson* commenced his action against *Sommers* for slanderous words, and obtained a verdict and judgement against him, together with a certificate of the court that the cause of action accrued from the wilful and malicious act of *Sommers*. Execution was issued, and *Sommers* was committed to prison by virtue thereof, and was in prison on the tenth of November, 1830, and long afterwards. *Sommers* petitioned the county court for relief, under the statute which was passed on said 10th day of November; and the court adjudged he was entitled to relief, and the following exceptions were filed and allowed; upon which the case came up to this Court:

“ This was a petition for relief, under the statute of this state, entitled, “ An act in relation to imprisonment on executions for torts,” passed November 10, 1830. On the hearing of said pe-



tion, it was objected, on the part of the petitionee, that said statute was not in terms applicable to the present case ; and that, if applicable, it was unconstitutional and void, as against the petitionee. But said objections were overruled, and the court being of opinion, upon the evidence adduced, that the petitioner's case came within the operation of said statute, adjudged and directed, that, on and after the first day of June, A. D. 1831, he should be entitled to the benefit of the several acts for the relief of poor debtors ; he making application to the jail commissioners, and complying with the requisites of the law for that purpose. To all which the petitionee excepts."

CALEDONIA,  
March,  
1832.

Sommers  
vs.  
Johnson.

After argument by *J. Matlocks* and *Fletcher*, for the petitionee, and *Davis*, for the petitioner,

*HUTCHINSON, C. J., pronounced the opinion of the Court.*—Two questions only are presented in the case before us. The first is, whether the statute, passed November 10, 1830, extends its relief to persons then in prison? The expression of the statute is, "whenever any person is imprisoned, &c." It is contended that this only looks forward to new cases of imprisonment. We think it not necessary so to limit its extent. It is a remedial statute. It was made to remedy the evil of imprisoning persons for torts, and depriving them of the power to labor to obtain their own living, or to obtain the means of paying their executions, after their imprisonment had become a mere punishment to them, without any prospect of benefit to their creditors. The statute provides, that, in such cases, the county court, on petition to them, as was made in this case, may inquire into all the circumstances of the case, and grant the power to petition the jail commissioners for liberation on taking the poor debtor's oath. It becomes the duty of the Court to decide, under this statute, whether the imprisonment has become merely punishment, and whether the prisoner has been sufficiently punished, and whether it is safe, and best for society, that he should be liberated, in case he can show his poverty before the jail commissioners. For all these purposes, nothing depends upon the time, when the imprisonment commenced ; but upon its length, and its effects upon the prisoner, in reforming him, and reducing him to poverty, and bringing distress upon his family, if he has one. The expression of the statute is clearly prospective in some sense. It is so with regard to preferring the petition to the court, and all proceedings under it. But the expression is perfectly applicable to a man's being in prison at the time of preferring his petition, with regard to the time, when the

WASHINGTON, March, 1832. unless the credibility of the plaintiff, as a witness, can be shaken with the jury.

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Pineo.

4th. That it had been solemnly decided, by the supreme court of Massachusetts, that it is competent for the defendant to show the bad character of the plaintiff for chastity by general reputation.—2 *Dane's Dig.* 517, *Warmstead's case*, which has not been overruled.

5th. That in rape, the character for chastity of the female may be impeached, she being a witness, and the respondent may prove her notorious want of it.—1 *Phil. Ev.* 147 ; 2 *Starkie*, 368. How much stronger the reason for its admission in a private prosecution, and for her sole benefit, and when she testifies to her previous purity.

6th. The statute leaves her credibility to the jury, under the necessity of the case, as to those facts which she only can be supposed to know.—14 *Mass.* 387 ; 1 *Phil. Ev.* 72 ; 2 *Dane*, 517.

*The plaintiff's counsel contra.*—The only question presented for the decision of this Court, by the bill of exception, is, did the county court err in excluding the evidence, offered by the defendant, tending to prove, that the plaintiff, before the time she testified the child was begotten, was reputed to be a common prostitute.

The evidence, we insist, was properly rejected. 1st. Because the evidence to impugn the character of the witness should have been confined to her general character for truth and veracity.—*Vide Commonwealth vs. Moore*, 3 *Pick. Rep.* 194. *Mr. Starkie*, in his treatise on evidence, says, “the proper question to be put to a witness, for the purpose of impeaching the general character of a witness, is, whether he would believe him upon his oath.”—1 *Starkie's Evidence*, 146. *Judge Swift* says, “The only questions to be put to a witness are, whether he knows the general character of the witness, intended to be impeached, in point of truth among his neighbors? And what that character is? Whether good or bad?”—*Swift's Ev.* 143 ; 1 *Sw. Dig.* 46. In *Jackson vs. Lewis*, 13 *Johns. Rep.* 504, where an attempt was made to impeach a witness on the ground of her having been a public prostitute, *Thompson, Ch. Justice*, said, “It would not be competent to prove, that she was *now* a public prostitute, and much less to enquire whether she was so in her younger days. The inquiry should have been, as to her character for truth and veracity. The

inquiry as to any particular immoral conduct is not admissible against a witness."

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2d. The evidence offered was immaterial to the issue. In *Commonwealth vs. Moore*, where the same question arose, that was presented to the court in this case, *Wilde, Justice*, said, "The evidence rejected was immaterial, the witness's character for chastity being sufficiently impeached by her own confession; so that, if the evidence had been admitted, it would have made no difference in the verdict. The evidence, however, was clearly inadmissible."—*Vide Rex vs. Teal, et al.*, 11 *East Rep.* 311.

*The opinion of the Court was delivered by*

HUTCHINSON, C. J.—The Court are of opinion, that this testimony was correctly rejected. There is no pretence, that this objection goes to the competency of the witness. It was not offered for that purpose. And surely it can be no test of the particular grade of confidence, that should be placed in her testimony. There is a difference, in this respect, among persons of this character as well as others. If such a reputation should have any effect, it is merged in the evidence of general character in point of truth; and the defendant can take every proper advantage of this, on the enquiry for the witness's general character for truth. The authorities, cited by the plaintiff's counsel, are pretty full in point; and such have been the decisions in this state, on several jury trials: but the question has not probably before been revised by the Supreme Court. The reason assigned by *Mr. Justice Wilde*, in the case cited from *Massachusetts Reports*, is not altogether satisfactory, as a general rule. He says the evidence was immaterial, as the chastity of the witness was already impeached; meaning by the facts she disclosed. This supposes that none but common prostitutes are found in this situation. This can not be a correct supposition. Undoubtedly some are seduced and ruined, with no connection with any but their seducer. The true reason is, that such a reputation is no certain, correct test of truth. There is no way to ascertain, how far the reputation of a prostitute affects her truth, but by proving her character for truth.

The judgement of the county court is affirmed.

*Janes & Briggs*, for defendant.

*Dillingham, Upham & Keith*, for plaintiff.

## CASES IN THE SUPREME COURT

WASHINGTON, **THE TOWN OF MARSHFIELD, appellees, vs. THE TOWN OF MONTPELIER, appellants.**  
*March,*  
 1832.

An officer's return upon a *warning-out process*, that he made service in one of two ways, without stating which, one of them being good, and the other bad, is a deficient return.

When several persons are named in one precept, and the officer returns, that he served it regularly on some of them, stating the manner particularly, and then, as to the service upon others, he says, he served it on them, *as above stated*; by its incorporating what is referred to, and that being correct, it is a good return.

The facts in this case appear in the following bill of exceptions, allowed by the judges of the county court, to wit :

“ This was an appeal from an order of removal of one *Giles Merritt*, from the town of *Marshfield* to the town of *Montpelier*. Plea, that the pauper was unduly removed, because his last legal settlement was not in the town of *Montpelier*. On which plea issue was joined to the court. On the part of the town of *Marshfield* it was proved, that the pauper, with his family, came to reside in *Montpelier* in the year 1809 ; and continued to reside in said town more than one year. The town of *Montpelier* then offered in evidence a warning served upon the pauper in January, 1810 ; to the admission of which the said town of *Marshfield* objected ; and it was excluded by the court. The town of *Montpelier* then proved, that the pauper removed into the town of *Berlin*, in March, 1812, with his family, and continued to reside in said town of *Berlin* one year and one month. It was then proved by the town of *Marshfield* that the pauper, afterwards, in the year 1813, again removed into *Montpelier*, with his family, and continued to reside there two or three years. The town of *Montpelier*, then offered a copy of a warning and service thereon, duly certified ; to the admission of which the town of *Marshfield* objected ; and it was excluded by the court. Judgement was rendered accordingly for the town of *Marshfield*. Both of said precepts were regular ; but the objections were made to the service. The town of *Montpelier* excepts to the decision of the court, in excluding said papers, which are made part of this case, and are hereto annexed.”

*The officer's return on the first precept.*

“ Caledonia, ss. *Montpelier*, 22d January, 1810.—By virtue of the within precept, I have summoned all the within named persons to depart the town, agreeable to the within request, as the law directs for the service of summons, by delivering each of them a true and attested copy of this summons with this my return endorsed thereon, or leaving a copy of the same description at their last and usual place of abode in said *Montpelier*, with some person of discretion, &c.

Attest, *Nathan Doty*, constable.”

Recorded January 22d, 1810.

Attest, *Joseph Wing*, town clerk.

*The officer's return on the last precept.*WASHINGTON  
March,  
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" Jefferson, ss. Montpelier, May 26, 1813.—I then served this precept on the following persons, by delivering each of them a true and attested copy of the same, with this my return hereon thereon endorsed, to wit. [Here several names are inserted.] And on the 2d day of June, in the said year, 1813, I served this precept on the following persons, as above stated, to wit : *Giles Merritt* and *Charles Nelson's* family.

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Montpelier.Attest, *Nathan Doty*, constable.

Fees \$12,00.—Received June 3d, 1813, for record, and recorded.

Attest, *Joseph Wing*, town-clerk,

*Merrill and Spaulding, for defendants.*—The statute of 1801 directs, that the precept shall be served in the same manner, as is provided for the service of writs of summons, in the 26th section of the "act constituting Supreme Courts," &c. The 26th section, above referred to, declares, "that all writs of summons shall be served on the defendant or defendants, by delivering him, her, or them, a true and attested copy of said writ, with the officer's return thereon ; or by leaving such copy at the house of his, her, or their usual abode, with some person of sufficient discretion, then resident therein," &c.—*Stat. 64.*

The following principles, in relation to the service of this precept, have been settled in this state. "The officer's return on the warning must state the particular situation in which the copy was left.—*Brandon vs. Pittsford, Brayton's Rep. 183.* "Where service of a warning to depart, &c., is made by leaving a copy with some person, other than the pauper, at the house, &c., it is essential that the officer certify, that the person, with whom he left the copy, was *then resident therein*," &c.—*Reading vs. Rockingham, 2 Aik. Rep. 272.* "The statute must be strictly pursued, in the service of a warning-out process ; it being wholly a statute regulation."—*Townsend vs. Athens, 1 Vt. Rep. 284.* "When a warning directs a constable to warn several persons to depart the town, the return must show that the officer left a copy with each."—*Waterford vs. Brookfield, 2 Vt. Rep. 200.*

The return of the officer in this case, it is believed, is a strict compliance with the statute in every particular. The statute does not require of the constable to use any particular form of words in his return. It is sufficient, that enough appear to show that he has pursued the statute ; and does not sufficient appear in this return ? The words, "*above stated*," refer to the mode of service mentioned in the first part of the return, and those words are sufficiently precise to satisfy the severest critic. It is contended,

WASHINGTON therefore, that the return is a literal compliance with the statute, and that for every purpose, it must be considered the same as though those words had been repeated after the name of the pauper. The service of this warning on the pauper is expressed with as much certainty, as it is in relation to the other persons mentioned in the warning. The certainty in both cases may be denominated a *certainty to every intent in particular*. A reference in one count, in civil cases, to facts mentioned in a preceding count, has always been sufficient, and is considered the same as a repetition of the same facts. So in cases of indictment, where the greatest degree of certainty is required.—1 *Chit. Crim. Law*, 205.

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*Smith and Peck, for Marshfield.*—The warning of 1810 was properly rejected. The officer's return should show, that the individual, with whom the copy was left, was then resident in the pauper's house. This omission is fatal.—2 *Aik. Rep.* 272. The case, then, turns upon the validity of the warning of May, 1813. To this record it is objected,

1. That it does not appear, that service of this warning was made in *Montpelier*. The constable says, he served it on the pauper "June 2d;" but does not allege it to have been within his jurisdiction. It might have been served at Berlin, or some place other than *Montpelier*, for aught that appears from the record; in which case, the service would be void.

2. The record does not show how the warning was served. The language of the return is, "June 2d, I served this precept on the following persons, *as above stated*, to wit, *Giles Merritt*, and Charles Nelson's family." But he has no where set out how he served it on them, as he was directed to do by the statute,—*Comp. Stat.* 64, s. 26. In the return next preceding this, he says he served it on the following persons, &c., "as above stated;" and, in the same manner, he has returned his doings made at several different days. The statute has been strictly followed in the service made on the 26th of May; and, if the words, "as above stated," refer to the mode of service there adopted, then the fair reading of the return is, "I served this precept on *Giles Merritt*, &c. by leaving a true and attested copy, with William Upham, &c." At all events, it is no more than saying, that the warning was served on the pauper, in the same manner that it was served on Mr. Upham. It is submitted, that every return must be complete in itself, and that it cannot be aided by a reference to the re-

turn of another service. Suppose an officer, having a writ against A and B, returns, that he served it on A, by attaching certain personal property, which is specified ; would it be held sufficient for him to say, that he served it on B, *as above stated*, or in the same manner as on A, without saying any thing more ? Or, to put the case of his holding an execution against A and B, which he executes by levying on, and selling, a horse of A, and pursues all the requisitions of the statute, which he returns on the execution ; and he then seizes and sells a horse of B, on the same execution ; would it be sufficient for him to state in his return, that he levied on, and sold, said horse, "*as above stated* ? Or, should he set off a tract of land as the property of A, specially endorsing his doings on the execution, and he then extends it on another tract as the property of B ; would any title pass to the creditor, if he should merely state in his return, that he set off said tract of land, and caused it to be appraised in the same manner, that he did the parcel belonging to A ? It would hardly be urged that this would do. And how does either case put differ from the one at bar ? Thus, it is a well settled principle in pleading, that, although several counts for distinct causes of action may be joined, yet each count must be complete in itself. If a plaintiff should in one count allege, that the defendant promised to pay him \$200, in two annual payments from a given day, it would hardly be deemed sufficient for him to allege in another count, that the defendant promised to pay him the further sum of \$600, *as above stated*. An averment of when, and how, it was to be paid, would be required ; and a reference to the first count, by which all this might be ascertained, would not cure the defect. On principle, the objection to the record in the present case would seem to be equally fatal. This Court has, in a great variety of cases, decided, that in pauper cases, nothing is to be taken by intendment ; that the utmost particularity in warning-out processes, is required.—2 *Aik. Rep.* 272 ; 1 *Vt. Rep.* 286.

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Montpelier.

HUTCHINSON, C. J., delivered the opinion of the Court.—The service of the warning of 1810, during the pauper's first residence in *Montpelier*, is not correct. The constable has certified in his return, that he served the summons on the several persons therein named by delivering each of them a true and attested copy of the same, with this his return endorsed thereon, or leaving a copy of the same description at their last and usual place of abode in said *Montpelier*, with some person of sufficient discre-



WASHINGTON **tion.** He has not informed in which of the two ways he made the  
 March, service. There being several persons named in his precept,  
 1832. probably he means, that he served it on some in one of those  
 Marshfield ways, and on others the other way. Possibly this might do, if  
 vs. both ways were legally good, and the way he first mentions is  
 Montpelier. according to the statute. But the service upon those, to whom  
 the copy was not delivered in person, is defective, in not showing  
 that the person of discretion, who received the copy, was resident  
 at the pauper's usual place of abode. This the statute requires;  
 and it is a reasonable requirement. If not left with a person of  
 sufficient discretion, it might be treated as of no value, and the  
 pauper, or a defendant, in case of a suit, might never receive it.  
 If left with a person not resident at the usual abode of the pauper,  
 or a defendant, in case of a suit, it might be carried away and he  
 never see it, or hear of it. This first process of warning-out was  
 correctly excluded by the county court. But the case shows,  
 that the pauper, *Merritt*, after this, moved to the town of Berlin,  
 and resided there a sufficient time to gain a legal settlement there,  
 which, *prima facie*, discharges *Montpelier*. The town of *Marsh-*  
*field* avoid this by showing, that the same pauper, at the end of  
 his residence in Berlin, moved back into *Montpelier*, and there  
 resided a sufficient time to gain a legal settlement there. To  
 avoid this the town of *Montpelier* produce copies of the record of  
 a warning-out process in 1813, and before *Merritt's* last residence  
 in said town had continued a year. This precept is regular; but  
 exception is taken to the constable's return of his service. His  
 return is perfectly regular with regard to those on whom he made  
 service on the first day. He made service on different days;  
 and, as to the manner of such later service, says, "as above sta-  
 ted." Now the question is presented, whether we can, and should,  
 incorporate that, which is thus referred to, and read as if it were  
 here repeated, instead of such reference. Cases are referred to in  
 argument, to show it too vague and loose for an officer's return to  
 leave a defect, and endeavor to supply it by a reference to some-  
 thing out of his return. This would probably be so considered.  
 But we discover no such difficulty in a reference to another part  
 of the same return. The reference in this case is perfectly intel-  
 ligible. And, where writings may be shortened by a reference to  
 something already written, we may read the matter referred to in-  
 stead of the reference merely. Let us so treat this return, and  
 how does it stand? The officer says, on the second of June, "I  
 served this precept as above stated, on the following persons, to

wit, *Giles Merritt* and Charles Nelson's family." Now, supply the reference, and it will necessarily read as follows. June 2d, &c., I served this precept on the following persons, by delivering each of them a true and attested copy of the same, with this my return hereon, thereon indorsed, to wit, *Giles Merritt*, &c. This was returned and recorded on the third day of said June, which was in season as relates to this pauper, and some others, on whom service was last made.

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1832.

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It was suggested in argument, that the expression, *as above stated*, in the return, when incorporated, would mean delivering a copy to others, and not to this pauper. But this is not the case, when we incorporate the matter referred to as we have already done, *reddendo singula singulis*, we apply to each person, what belongs to him and the sense is perfectly clear. A suggestion has been made of the difficulty of making one return of a service on several different persons, and a copy left with each, and a copy of his return on each copy. This cannot be literally done. If a summons is to be served on several persons, the only way in which our statute can be literally complied with, is for the officer to write upon his precept a full return, with regard to each person, and copy that return upon the copy he leaves with such person. Yet the statute is substantially complied with, when the officer makes one return upon his precept, therein describing truly his service upon each, and signs it at the bottom, and in fact puts upon each copy so much of this general return, as relates to his copy. That would make, on each copy, a full return of what related to the person with whom this copy is left. This is probably all that is usually done by officers when they make service of a writ of summons on several defendants. We consider the decision of the county court, rejecting this last warning-out process, to be erroneous : their judgement is reversed and

A new trial is granted.



SAMUEL B. COOPER vs. JOSEPH R. CREE, et al.

Essex,  
March,  
1832.

A declaration on a receipt, taken by an officer for property, attached upon *mesne process*, should contain sufficient averments to show, that the lien, created by the attachment, has been preserved ; especially when the original debtor is defendant.

This was an action of *assumpsit* for four oxen and various articles of other personal property, which the plaintiff alleged he delivered to the defendants at their request, and which they promis-

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**Cooper**  
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**Cree et al.**

ed to return, &c. ; and set forth his title to the property to be his, having attached it in the year 1824, as the property of Oliver Ingham, one of these defendants ; and alleged the defendants' promise to be, to deliver said oxen, &c., to said *Cooper*, or to any other officer, legally authorized to demand and receive the same, when demanded. The plaintiff then alleged a demand of the property in June, 1831, and the neglect and refusal of the defendants to deliver it. All these things were averred with sufficient certainty ; but nothing was said about the return of the writ, or any proceedings in the suit, or any circumstance showing a continuance of the lien, created by the attachment. To this declaration the defendants demurred, and the plaintiff joined in demurrer. The county court rendered judgement for the defendants, and the plaintiff appealed to this Court. At this term, the defendants' counsel urged the defects of the declaration, in its not showing any facts to support the lien, upon which the plaintiff predicated his action.

*HUTCHINSON, C. J., pronounced the opinion of the Court.—*The plaintiff's whole claim is by virtue of his having attached the property in question upon a writ in favor of one Lake, against Oliver Ingham, one of these defendants. He ought to have added to his present declaration, the return of his writ, the entry of the action, and proceedings therein to final judgement ; the taking out execution, and delivering of the same to the officer, within thirty days from the judgement. He cannot recover against Ingham, the original owner, without he has kept his lien good, and that must appear in the declaration. Should we treat as surplussage what is said about the plaintiff's being deputy sheriff, it would not cure the defects ; for that is incorporated into the promise, and into every important part of the declaration. Besides, it once appearing in the declaration, that the property in question was attached as the property of Ingham, one of the defendants, nothing can entitle the plaintiff to recover short of his lien kept good to the end of the first suit, and the delivering out of execution in thirty days. Judgement, that the declaration is insufficient. Afterwards, on request of plaintiff's counsel, he was permitted to enter a nonsuit, with full costs.

*Pearson*, for plaintiff.

*Cushman*, for defendant.

**E. H. WARNER, administrator of GEORGE WARNER, deceased, vs.  
ENOS PAGE.**

Essex,  
March.  
1839.

A seizure in fact of land under colour of title, is itself sufficient title for the plaintiff to recover against a defendant, who afterwards enters without colour of title.

If a tenant at will of land discontinues his possession, this should be treated as an abandonment to his landlord.

A having given a deed of warranty of land, and afterwards having put a third person in possession of the same land, should be considered as having done this in behalf of his grantee, or as his agent; at least, he may be presumed to have so done.

- This was an action of *ejectment* for lot no. four, in the eleventh range of lots in Concord, being the second division, laid to the right of Gideon Tiffany, an original proprietor. The plaintiff produced a warranty deed of the premises, executed to his intestate by Azarias Williams. He also produced deeds to show, that Williams claimed to be the owner of Tiffany's right: but one deed was a vendue deed, and was not supported by sufficient testimony to render it valid to convey the title. The lot in question was taken up and possessed by one Collington, previous to the year 1809; and there was evidence, tending to prove, that, soon after Collington went into possession, he applied to Williams, and consented to hold said premises subject to Williams' supposed title; that he continued this possession, till after the conveyance from Williams to *Warner*, which was on the fifteenth of April, 1814. There was also contradictory evidence, tending to prove said possession discontinued, and abandoned a year or two previous to said conveyance. There was also evidence tending to prove, that, in the fall of 1814, one Sargent went into possession, under a verbal contract then made with Williams for the purchase of the land, and that the possession so taken by Sargent had been transmitted through several persons to the defendant; and also evidence tending to disprove any privity or connection between Williams and Sargent, or those who succeeded him. The counsel for the plaintiff contended, that, if Collington was at any time holding under Williams, though such possession should have been discontinued and abandoned before the execution of the deed from the latter to *Warner*, such possession would entitle *Warner* to recover in this action; the defendant not showing any paper title, nor a possession for fifteen years, before the commencement of this action. Also, that, if Sargent entered under a contract with Williams for a purchase, though after Williams had deeded to *Warner*, Williams should be presumed to act as the agent of *Warner*, who might therefore avail himself of such possession by Sargent, whereby to

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recover against the defendant. The court instructed the jury, that, if Collington held in subjection to the supposed title of Williams until after the deed from Williams to *Warner*, such possession would enure to the benefit of *Warner*, and give him an actual seizin of the premises ; which, if not discontinued and abandoned before the entry of Sargent, would entitle the plaintiff to recover. But if such possession by Collington was discontinued and abandoned, before the deed aforesaid was given, no seizin in fact passed to the plaintiff by said deed ; and if after said deed was given, so long an interval of time elapsed, between the last acts or claim of possession by Collington, and the commencement of those by Sargent, that the possession could not be reasonably regarded as continuances, but might be taken to have been abandoned for a time : in neither case was the plaintiff entitled to recover on the possession of Collington. The court further charged the jury, that whether the plaintiff could avail himself of the possession of Sargent, as an original possession, giving a seizin to the plaintiff, depended on two questions ; first, whether Sargent entered under any contract or license of Williams ; and second, whether Williams was acting by authority of, or as agent of the plaintiff ; that both questions must be decided by the proof in the case ; and that neither was determined by any presumption. Verdict and judgement for the defendant. And to so much of the charge of the court, as is above alluded to, the plaintiff excepted.

The cause came up to the Supreme Court upon a bill of exceptions, showing the foregoing facts.

*Mr. Fletcher, for the plaintiff*, contended, that the instructions to the jury were incorrect upon both points ; that, if Collington abandoned the premises, after having consented to hold under Williams, that would operate as a surrender to Williams, or his grantee ; that the instructions with regard to the possession by Sargent were too indefinite, and excluded the plaintiff from the benefit of presumptive evidence, to which he was entitled.

*Hibbard and Cushman, for defendant*.—If there was any error in the charge of the court, it was in favor of the plaintiff, and he cannot avail himself of it. Collington could not in law hold in subjection to the supposed title of Williams, when he took possession of the land in his own right, without surrendering the same by deed or note in writing. At all events, if Collington abandon-

ed his possession, as the case shows, no seizin in fact passed to plaintiff, and he cannot recover.

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The evidence tending to prove, that Sargent went into possession of the land in the fall of 1814 ; and also the evidence tending to disprove any privity or connection between Williams and Sargent, could only be decided by the proof in the case. If the jury had found, by the proof in the case, that Sargent did enter under any contract or license of Williams, as the agent of *Warner*, they could only have found for the plaintiff, if they regarded the charge of the court. If the jury had found, that Williams contracted with Sargent, in his own right, and not in the right of *Warner*, they were not permitted to find, contrary to evidence, that Williams was acting as the agent of *Warner*. But if the jury found, as must be presumed by recuring to the whole case, that Sargent never made any contract with Williams, or *Warner*, about the purchase of said lot, then the plaintiff's whole case falls to the ground, he having neither title nor possession. Perhaps it will be said by plaintiff's counsel, that many recoveries have been had in actions of ejectment, when the plaintiff did not show a legal paper title. Admitted. But we know of no case of a recovery on such evidence, as was offered in the present case. All the cases that we have been able to find, were founded on proof, that the defendants held under one, who had taken a lease of the plaintiff, or had himself taken a lease of the plaintiff, or those under whom the plaintiff held ; or had himself contracted to purchase of the plaintiff, and, under such purchase, had taken possession, and failed to fulfil his contract.

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*The opinion of the Court was pronounced by*

HUTCHINSON, C. J.—The plaintiff has shown no other title in his intestate than actual possession, by his tenant, under his claim of title ; and, whether he has shown this, depends upon the finding of the jury, under correct instructions from the court, upon the point of the tenancy, either of Collington, or Sargeant, or both. As it was left to the jury, they found for the defendant. The correctness of the instructions upon these possessions is all we have to examine. As the jury might probably understand these instructions, they might not lead to a correct result in their deliberation. By the expression, “ if the possession by Collington was discontinued and abandoned, before the giving of the deed from Williams to *Warner*, no seizin passed by the deed,” the jury might consider, that they had nothing to consider but the true time, when

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Collington left the possession. Whereas, if Collington consented to hold under Williams' supposed title, and, from that time, held in that way, his going away and leaving the farm vacant, would be a surrender of it to Williams, or to his assignee or grantee. If we call it abandonment, it would be abandonment to Williams or his grantee. We must bear in mind, in all this, that the defendant sets up no title. Against a person in such a condition, a prior possession under claim of title is itself sufficient title, unless the premises are left vacant for so long a period, as to create a presumption, that all concerned in such prior possession had abandoned it. There seems to have been no evidence in this case sufficient to warrant such a presumption. If the jury might presume, that Collington had left the premises with no intention of returning, yet there was no ground to presume, that Williams and *Warner* had abandoned their claim. With this view presented to the jury, it is possible, they might have found for the plaintiff.

An exception was also taken to the instructions with regard to the plaintiff's availing himself of the possession of Sargeant. There being evidence to be weighed on both sides, whether Sargeant took possession under a licence from Williams, the court instructed the jury, that this, as well as the question of Williams' acting as agent of *Warner*, must be decided by the proof, and not by any presumption. This was liable to be misunderstood by the jury. It is true, there must be no presumption, aside from the proof of facts, from which the presumption might be raised. But there seems to be evidence, in this case, from which the jury might infer, that Williams acted as agent for *Warner*, in putting Sargeant in possession. On inspection of the deed from Williams to *Warner*, we find it to be a warranty deed. That gave Williams a deep interest in having a possession kept under his title, if he were not very sure, that his vendue title was perfectly good. Whatever Williams did in procuring inchoate, or auxiliary, or absolute title, would all enure to the benefit of *Warner*, his grantee. Now, if the jury found, that Sargeant took possession by licence from Williams, the evidence, that Williams had thus given a warranty deed to *Warner*, and that *Warner* was not disturbing, or complaining of, this possession, was proper to be left to the jury as a ground of presumption, that Williams acted as agent of *Warner*. This was not so left to the jury, and the charge was liable to be understood as excluding all presumption from the case; or deciding, that there was no testimony proper to raise a presump-



tion, favorable to the plaintiff, on the subject of the possession of Sargent.

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The judgement of the county court is reversed, and a new trial is granted.

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**CYRUS BOOTHE, administrator of LUTHER E. HALL vs. THE TOWN OF COVENTRY and FREDERICK W. HAMMOND.**

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The location of a lot of land to a public right may be established by acquiescence, as well as to any other right.

A possession for fifteen years by the defendant, adverse to the plaintiff, bars the plaintiff's action, whether the defendant claimed in his own right, or under the town.

This was an action of *ejectment*, which came up from the county court upon the following bill of exceptions, to wit :

"The was *ejectment* for the south east quarter of lot no. 138, in Coventry, containing thirty two acres. The paper title of the plaintiff was not questioned; and the parties, by mutual consent, waived any enquiry, whether the plaintiff's intestate had done any acts, or made any declarations, signifying his acquiescence in a division of the town, made many years since, severing this lot to the public right, under which the defendants claimed to hold it. And no attempt was made on the trial to show said division to be legal. The only question in issue was, whether the plaintiff was barred of his action by the statute of limitations. Evidence was given tending to show, that a possession, adverse to the plaintiff's title, had been taken of the lot in question more than fifteen years before the commencement of this action, and that said possession had been transmitted without interruption through different hands to the present occupants—the defendant, *Hammond*, being in possession of the part sued for, and different individuals of the other parts of said lot; and that said possession was originally taken, and had always been held, under the town; the occupants having continued to pay rents for the same as a public lot, belonging to one of the public rights in said town. It did not distinctly appear, whether the part sued for had been leased or not; but rents were paid upon it. The plaintiff contended, and requested the court to charge, that, under such circumstances, neither of the defendants could be availed of the statute of limitations; and that, unless a legal division was shown, severing the lot in question to the public right aforesaid, the plaintiff was, of course, entitled to recover. But the court refused so to charge; and instructed the Jury, that if they found an actual possession of the premises, demanded, adverse to the plaintiff's title, to have been taken by the defendant, *Hammond*, or those under whom he claimed, and continued without interruption for more than fifteen years before the commencement of the plaintiff's

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action, whether such possession was subject to such supposed right of the town or not, the action was barred. Verdict and judgment for the defendants. And to the charge aforesaid, and the refusal to charge, as above requested, the plaintiff excepts.

*West and Fletcher, for the plaintiff.*—1. The plaintiff contends, that the charge is too indefinite and uncertain. The case shows, that rents were paid on the part sued for, but does not show that that part had been in actual possession of the defendant's *a pede possessionis*. From payment of rents, actual adverse possession can not be presumed nor inferred, and the jury should have been so instructed.

2. A political corporation, as such, can neither take, gain, nor hold, title by adverse possession. A corporation is a mere creature of the law—an invisible, intangible, imaginary, artificial, being. It has no will to determine, no hands to assault, no feet to perpetrate, a trespass *quare clausum fregit*. It follows, that it can not be guilty of a disseizin. It is in law a mathematical point. It has neither length, breadth, nor thickness. It can not be arrested, nor imprisoned, nor guilty of an escape. In short, it has no locality. How then, can it have actual possession of lands. No freehold court could be sustained to dispossess, if it held over; no action of ejectment against it, as such, could be sustained, nor could any writ of possession be issued to turn it out of possession. A corporation can not hold lands, unless by express statute. How then acquire title by possession? Trespass and replevin can not be sustained against it.—*Saund. Pl. and Ev.* 474. It can not acquire a freehold by disseizin.—2 *Mass.* 502, *Werton vs. Hart*.

*Young and Sawyer, for defendant.*—The paper title has been decided at a former term, upon a case stated. This cause was sent down "*for trial upon the facts of possession only.*" It was intended, by the case stated, to submit to this Court every thing appertaining to the law questions, that could arise. And we supposed the mere fact of possession was all the question, provided this was legally found. But, if the Court should inquire as to the right of a town's gaining a title to lands by possession, or their tenants, either jointly or separately, we are confident, that the plaintiffs cannot prevail.

How can *Hammond's* possessory right be defeated, if his title fails through the town? This does not make him a tenant to the plaintiffs. Again: What prevents a town gaining possession? The case, *State vs. Wilkinson*, 2 *Vt. Rep.* 480, is not directly in point,

but analogous. The doctrine *nullum tempus occurrit regi*, is essentially destroyed ; (*Bal. Lim.* 18-19 ;) and it does not apply to this cause in any shape. Where one holds lands, &c., as lessee, his possession, in contemplation of law, belongs to the lessor.—*Bal. Lim.* 27. It could not make any difference, whether the defendant was in by deed or parol. If the title of the town failed, the possession of the tenant would hold. The court undoubtedly was correct in refusing the charge asked for, and giving the one they did.

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HUTCHINSON, C. J., pronounced the opinion of the Court.—The facts, stated in the bill of exceptions before us, would present a clear case of fifteen years adverse possession, if the question arose between individuals merely, and the testimony gained credit with the jury. There appears to have been evidence tending to show that the defendant, and those under whom he claimed the premises, had been in possession more than fifteen years, paying rent to the town of Coventry, and considering this as being a lot belonging to one of the public rights of the town. But the plaintiff's counsel strongly urge, that the defendant's possession under the town cannot avail him, nor the town, because a town, as a corporate body, cannot obtain title by possession ; and there is no evidence to show a location of this lot to any public lot of the town. If this argument were correct in reference to the power of the town to gain title by possession, it would not materially affect the cause ; for it still leaves the possession adverse to the title of the plaintiff, and wholly bars his claim. Whether the possession of the defendant, *Hammond*, for fifteen years, shall enure to his benefit, or that of the town, is a matter between him and the town, merely.

But the plaintiff's counsel urge a principle, that will not be easily maintained : the principle that a town can gain nothing of title by possession of land. A corporation, that has no right to hold land at all, cannot gain title by possession. But a corporation, that has unlimited power to hold land, may acquire title in all the ways in which individuals may acquire it. They may take by grant, by deed, by possession. Their power to possess is denied in argument. But they may possess. They may make leases, and possess by their tenants. And, if they take possession, by their tenants, of lands not their own, they may be sued in ejectment as landlords, and joined with their tenants. But this is going beyond the case before us ; for it stands as part of our common law, that towns own public rights of different descriptions.

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And, when *Hammond* claimed to possess under the town, and paid rent to the town, no right of the town need be affected by possession, except the location of this lot to the public right of the town. Now the same rule of acquiescence applies to the location of the public lands, as to the lands of individuals.

The instructions given to the jury were perfectly correct. They left the jury to decide the cause upon the mere question of the defendant's possession being adverse to the plaintiff; admitting the plaintiff's title to be good unless barred by this adverse possession. The defence should turn upon that point. Whether the defendant claimed in his own right, or under the town, was immaterial. Either was adverse to the title of the plaintiff.

The continuance moved for at a late hour cannot be granted. The affidavit, upon which that motion is grounded, relates to nothing but the weight of evidence upon the subject of possession. It would seem to affect that but by a slight or doubtful shade. It would lead to nothing unless it were a motion for a new trial, founded on surprise. And it will scarcely be pretended by the plaintiff's counsel, that such a motion ought to be sustained upon the grounds, merely, that are stated in the affidavit.

The judgement of the county court is affirmed.



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JONATHAN B. SPENCER vs. AMOS W. BARNUM.

B and S, being joint owners of a raft of timber, employed an agent to sell the same for their joint benefit;—it was holden that the agent was a competent witness for S to prove that B, without the consent of S, directed the agent to apply the whole proceeds of the timber to the payment of debts owing from B to the agent, and that he, the agent, had accordingly so made the application.

This was an action of *account render*, and came on to be heard on the report of auditors and exceptions following:

"The plaintiff produced evidence to show that in the month of June or July, 1828, he was tenant in common with the defendant in a raft of square timber alleged to amount to 19617 cubic feet, which timber was transported by the plaintiff and defendant to Whitehall, in the state of New-York, and was entrusted by them to the care of one Melancton Wheeler, of said Whitehall, to sell for their joint benefit. The defendant offered evidence to show that said raft of timber was estimated at more than it actually contained, &c.

The auditors decided, upon the whole evidence, that the defendant ought to account to the plaintiff for 9000 cubic feet of the aforesaid timber, being the share the plaintiff owned in it; and that defendant did take upon himself the charge of said raft to be

sold by Wheeler for the joint benefit of the plaintiff and defendant.

The plaintiff then offered to prove, that, under the direction of the defendant, the raft had been sold, and the proceeds thereof had been by said defendant's direction applied to his own personal benefit. The defendant contended, that he had not received, nor had procured, any part of the avails of the defendant's share in said raft to be appropriated to his use.

The auditors found, that the raft, by the advice and consent of the defendant, had been sold by Wheeler, the agent aforesaid, and the avails thereof had been applied to the sole benefit of the defendant, and that the said agent wholly refused to pay over or account with the plaintiff for any part of said timber.

The auditors report that there is in arrear from the defendant to the plaintiff, to balance the account of the said parties in the raft aforesaid, the sum of \$732 50, and costs of audit, taxed, &c.

The defendant contended it was proved, that Melancton Wheeler, the person who received the timber at Whitehall for sale, knew that so much of it as was marked B. S. was owned by *Barnum & Spencer*, and not by *Barnum* alone; and, consequently, that he was not a competent witness to show that he had accounted with defendant for the avails of said timber, nor that he had with such knowledge applied the avails to the extinguishment of defendant's private debts to him.

The auditors found by the testimony of Wheeler, that he did know, that *Spencer* had an interest in said timber marked B. S. and that Wheeler refused to account to the plaintiff for any part thereof, on the ground of *Barnum's* statement to him, that he had authority to control *Spencer's* share. And as to the competency of Wheeler as a witness, the auditors overruled the objection.

The defendant also contended, that it appeared Wheeler, the agent, had never finally settled for the avails of said timber with defendant, and that he was still in possession of two notes against the defendant for \$700; and that he had not accounted with defendant for said sum, and had no legal right to withhold that amount from plaintiff and defendant; and, consequently, that plaintiff could not call on defendant to account for the same.

The auditors found, that the accounts of *Barnum* and Wheeler had never been finally adjusted; that Wheeler had the two notes, amounting to \$700, against *Barnum* still in his hands; that Wheeler swore on the trial he had accounted to *Barnum* for the said \$700, as directed by defendant."

#### *Exceptions.*

"The defendant excepts to the report of the auditors in this case, in this, to wit, That after the auditors found the fact, that the raft of timber in question was jointly owned by the plaintiff and defendant, and was placed by the parties into the hands of Wheeler to be sold for their joint benefit, the auditors erred in deciding that Wheeler was a competent witness for the plaintiff to prove the fact, that the defendant, without the consent of the

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plaintiff, directed Wheeler to apply the whole proceeds of said timber to the payment of debts owing from defendant alone to Wheeler; and by which direction he retains the avails thereof from the plaintiff. Also in this; That the auditors, having found the fact, that the accounts of the defendant and Wheeler had never been finally adjusted, and that Wheeler had still in his possession the two notes in his favor against the defendant of \$700, they erred in deciding, that the understanding between defendant and Wheeler, that the avails of the timber might be applied by Wheeler to satisfy said notes before such final adjustment is made, or said notes are delivered to defendant, or cancelled, was sufficient accounting for that sum by Wheeler to the defendant to make the defendant liable therefor to the plaintiff."

The county court decided that the exceptions were insufficient, and accepted the report of the auditors. The defendant having filed exceptions to the opinion of the court, the case was reserved for the opinion of this Court.

*Phelps and Bell, for the defendant.*—It is urged for defendant, that the evidence of Wheeler should have been rejected. If *Spencer* recovers of *Barnum*, and collects his money, Wheeler, in that case, can retain the money he holds to apply on his demands against *Barnum*. If he has to pay the money to *Spencer*, he would then have to run the risk of collecting his demands of *Barnum*. His interest, therefore, is clearly in favor of *Spencer's* succeeding against *Barnum*. If a witness is interested, the interest should be substantially balanced between the parties to render him competent to testify for either, and when that interest preponderates in favor of the party calling him, his evidence should be excluded.—*Owen vs. Mann*, 2 *Day's Rep.* 399; *Buckland vs. Tankard*, 5 *T. R.* 578.

It is also contended that when the auditors found the fact to be, "that the accounts of *Barnum* and Wheeler had never been finally adjusted, and that Wheeler had the two notes amounting to \$700, against *Barnum*, still in his hands," that the auditors mistook the law when they decided *Barnum* was liable to account to *Spencer* for a sum equal to the amount of the notes. *Barnum's* liability to *Spencer* to account for monies in Wheeler's hands could only be substantiated upon the fact that *Barnum* received of Wheeler the money, or that which was equivalent. It should appear in evidence, to create that liability upon *Barnum*, that such an application was made of the avails of the timber towards *Barnum's* debt to Wheeler, as would be binding on both of them. This appears not to be the case. Wheeler having the



notes, and no settlement being made between him and *Barnum*, he may sue *Barnum* at once on those notes. Nor can *Barnum* plead accord and satisfaction, or payment, until *Spencer* is paid. Wheeler's liability to account to *Spencer* would prevent any application, even by way of offset, by *Barnum*, of the money in Wheeler's hands upon those notes.

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*Tucker, for the plaintiff.*—The plaintiff in this case contends, that there is no error in the decision of the auditors—because, *First*. Although the timber in question was owned by the parties in this action, as tenants in common, and was, *by their mutual consent*, placed in the hands of Wheeler, as their agent, to sell, yet, the agent has legally accounted for the avails of said timber, by making full payment therefor to the defendant, who is liable to his co-tenant, in this action for such share as was owned by him, and the amount of which share was found by the auditors. Property owned in partnership is treated as holden by a tenancy in common.—*Read et al. vs. Shepardson*, (2 *Vt. Rep.* 126, *opinion of the Court*.) And although at the common law, (1 *Swift's Dig.* 337,) the mere ownership of personal chattels, as tenants in common, does not constitute a regular partnership, yet, it is contended, that the character of the dealings between these parties, out of which the present controversy arose, amounts, *as between them*, to a special partnership in this particular transaction. The auditors found, that “the defendant took upon himself the charge of the timber, to be sold by Wheeler,” (the agent,) “for the joint benefit of the plaintiff and defendant.” The sale for their joint benefit, the raft having been placed “*by their mutual consent*” in the hands of Wheeler, made them special partners in the profit or loss of the concern, according to the share which each respectively owned.—3 *Kent's Com.* 11; *Sims vs. Willing*. 8 *Sergeant and Raule*, 103. If A own a lighter, and B agree to work said lighter, and *divide the neat profits*, they are special partners.—1 *Sw. Dig.* 340. In the present case, the plaintiff got out the timber upon defendant's land, plaintiff furnishing the labor, and defendant the timber; and no division ever took place. The timber was all marked “B. S.” (the initials of both parties,) and the division of interest was evidently to be made after the sale. Every partner, whether general or special, has power to collect and discharge the debts due to the partnership, and the act of each binds the whole.—1 *Sw. Dig.* 340, 341; 3 *Kent's Com.* 17, 20, 21. If the interest of partners in partnership personal



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property is to be treated but as a tenancy in common, according to the case, *Read et al. vs. Shepardson*, (before cited,) how are the rights and liberties of partners and tenants in common of personal chattels to be distinguished? Are not their situations in law, upon this construction, undistinguishable? If their interest be treated as identical, how are the consequences, liabilities, and rights of each, to be discriminated? But without settling a perfect identity of interest, liability, and right, as to partners and tenants in common, under our system, it was always holden, at the common law, that if two tenants in common own a personal chattel, and one take it away or dispose of it, although the other cannot pursue such chattel itself, he may have his action against his co-tenant for his share of it.—1 *Sw. Dig.* 104 ; 1 *Ld. Raym.* 737, *Waterman vs. Soper*. Still if there could exist a doubt as to the right of the defendant in this case to receive of Wheeler, the agent, the avails of timber sold, *on behalf of himself and his co-tenant*, (or, as the plaintiff contends in this transaction, “partner,”) it would not lie with said defendant, after having so received the amount of said avails, to deny his co-tenant’s (or partner’s) right to his share, and to turn plaintiff over to a doubtful law suit with the agent, who has honestly and in good faith accounted for the whole to this defendant. The defendant had the amount applied (as found by the auditors) “to his sole benefit,” upon his own statement, that he “had authority to control *Spencer’s*,” (the plaintiff’s) “share.” If he is allowed to prevail with such a defence, he takes the benefit of his own wrong. Whether the agent be discharged by the accounting to *Barnum* for the whole avails or not, that accounting was sufficient to make *Barnum* liable to his co-tenant, (or partner.) He is his bailiff and receiver. An agent generally has a right to pay over money, in good faith, to either of the persons in interest, unless notified to retain it.—1 *Chit. Pl.* 26, 27 ; *Ld. Raym.* 1210, *Pond vs. Underwood* ; 4 *Term Rep.* 553, *Granway vs. Hard* ; *Strange*, 480, *Cary vs. Webster* ; *Bull. N. P.* 133 ; *Sadler vs. Evans*, *Tr. Term*, 6 *Geo.* 3d ; *Livermore on Agents and Factors*, p. 74. There is no finding, in this case, by the auditors, that plaintiff ever gave notice to Wheeler not to pay over the avails to *Barnum*.

*Secondly.*—It is contended for plaintiff, that if the payment by the agent, Wheeler, to defendant amounts to a good discharge for him, as to the plaintiff and defendant, he was a competent witness to show to whom he paid over the avails of the timber, having no interest whatever in the event of the suit, and interest being the

only ground upon which the competency of his testimony was or can be objected to ;—Or, =

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*Thirdly* :—That if said agent had no right to pay over to defendant, and is still liable for plaintiff's share of the avails of the timber, he is not thereby disqualified from being a witness between these parties.—2 *Esp. Rep.* 508, *Mathews vs. Hayden* ; 1 *Phil. Ev.* 100 ; 2 *Stark. Ev.* 753–4, 767–8–9. A judgement against defendant in this case, without satisfaction, would be no bar to a suit hereafter brought by the plaintiff against the said agent for the same claim.

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*Fourthly*.—That no final adjustment of the defendants *general account* with the agent, Wheeler, was necessary to enable the plaintiff to sustain his suit.—3 *Stark. Ev.* 1082. The agency of Wheeler, as to these parties, was a special one, *a mere single transaction*, in which it was not necessary that the accounts should be balanced to enable one co-tenant (or partner) to support his action against the other.—1 *Chit. Pl.* 28 ; 8 *Term Rep.* 146, *Martyn vs. Knowllys*. This transaction had nothing to do with any other dealings between this defendant and Wheeler. The manner in which the avails were accounted to this defendant is immaterial, and should affect no interest of the plaintiffs. It is not certainly any concern of this plaintiff, that the defendant applied the money to pay a preexisting debt due from him to Wheeler, or whether individual securities between defendant and Wheeler were given up or retained. The whole case rests upon the answers to a few plain queries. Did the defendant receive the money ? Had he a right to receive it ? Was its application for his own personal benefit, with his own consent, and by his own directions ? If so, is he accountable to his co-tenant, (or partner,) for *his* just share of it ; and is the agent who transacted the business for both these parties a competent witness to show the facts ?

*The opinion of the Court delivered by BAYLIES, J.*—The Court are called upon to decide whether Melancton Wheeler, an agent employed by the parties in the action, to sell their timber, was a competent witness for the plaintiff to prove that he had sold the timber, and accounted to the defendant for the same. If Wheeler was not competent to testify, it must be on the ground of interest. But the Court do not see that he had that interest, which should exclude him from being a witness. In the case of *Walton vs. Shelley*, (1 *T. R.* 296,) *Ashurst, J.* says, " The general rule is, that where a man is not interested in the event, he shall be a

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competent witness, though he may have a bias upon his mind with regard to the subject matter. As if a person bring two several actions against two defendants for the same battery, in the action against one, the other may be a witness, because he is not interested in the event. Any objection to such testimony should go to the credit, rather than to the competency of the witness." In the case before us, nothing is disclosed by the report of auditors that renders it certain that Wheeler was like to gain or lose any thing by the event of the suit. The exceptions to the report are overruled, and the

Judgement of the county court is affirmed.



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JOHN BULLOCK vs. ELIJAH CLOYES. SAME vs. PHILIP BEACH.

Where in an action for charging the plaintiff with stealing certain sheep, the defendant, for the purpose of mitigating the damages, gave in evidence the record in an action of trespass brought by the plaintiff against the defendant for taking away said sheep, in which judgement had been rendered in favor of the defendant; it was held, that the plaintiff, for the purpose of showing malice in the defendant, and to enhance the damages, might prove, by circumstantial evidence, that, at the time of accusing the plaintiff as complained of, the defendant *knew* the accusation to be false.

These two actions depended on the same principles, and were argued and submitted together on the following bill of exceptions :

" This was an action on the case for verbal slander. Plea, the *general issue*, and trial by jury. The plaintiff introduced evidence tending to prove that the defendant, on the 4th day of July, 1828, and at various subsequent times, spoke and published of and concerning the plaintiff, the words complained of, and that the same were spoken, in most instances, with reference to certain sheep taken by the defendant, on the said 4th day of July, 1828, from the pasture of the plaintiff. The defendant, for the purpose of showing that a controversy existed between himself and the plaintiff, in relation to said sheep, during the period of the alleged slander, and for the purpose of mitigating the damages, gave in evidence the record in an action of trespass brought by the plaintiff against the defendant and one Philip Beach, for taking and driving away the sheep aforesaid, together with the record in a petition for a new trial in said cause; both of which were determined in favor of the defendant and said Beach, at the Jannary term of the Supreme Court for the county of Addison, A. D. 1830; and the same are referred to as part of this case. And thereupon the plaintiff, for the purpose of showing malice, and to enhance the damages, offered to prove, by circumstantial evidence, that at the several times of accusing the plaintiff, as complained of, the defendant knew said sheep were not his, and had good reason to believe

they belonged to the plaintiff, and that he knew his said charges were false : and also that during the same period the defendant was making evidence to support his said charges,—but not specifying in the offer aforesaid, what evidence was thus made or the means employed in making it. This evidence was objected to by the the defendant, on the general ground, that it would lead to another trial of the same matters, which had already been adjudicated between these parties in said action of trespass. The court decided, that the adjudication in the action of trespass was not so far conclusive of the right of property in the sheep for the purposes of this action, but that the plaintiff was at liberty to prove by any direct evidence, that the defendant knew the sheep to belong to the plaintiff, or to have come lawfully into his possession ; but that an inquiry into the right of property upon circumstantial evidence for the purpose of inferring knowledge in the defendant, was not admissible. And the offer not being varied, the evidence was excluded. Verdict for the plaintiff,—with nominal damages, and judgement thereon. And to the decision of the court, excluding the evidence thus offered, the plaintiff excepts. Exceptions allowed, and the case ordered to the Supreme Court, and execution stayed.”

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*Phelps and Bell, for defendant.*—A single point only is raised in these cases : It is whether the court below erred in rejecting the evidence offered by the plaintiff for the purpose, as he alleges, of proving malice in the defendant, and to enhance damages. It is to be observed, that the words charged in the declaration are such as the law deems actionable, and the speaking of them being proved, and not justified, malice is inferred. The evidence offered was therefore unnecessary for the purpose of proving malice : its only bearing would have been upon the question of damages, after the issue had been determined for the plaintiff. In this point of view the exception becomes immaterial in the suit ; the jury, having found the issue for defendant, have decided either that the words charged were not spoken by the defendant, or if spoken, that it was in such a connection as not to import a charge of theft. The evidence would, therefore, have been of no service to the plaintiff had it been admitted. The fact intended to be established by it could have had no supposable influence over the jury in determining the question of guilty, or not guilty. Nor is the exception well founded in either case : 1st. The finding of the jury in the former action had decided the question of property, and the idea of proving knowledge in the defendant contrary to that determination is a legal absurdity. 2d. The plaintiff not having availed himself of the permission to introduce direct evidence of the fact, the facts and circumstances can be nothing more than

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was understood at the trial; viz., a mass of evidence which had been introduced by the plaintiff upon the former occasion to prove the property of the sheep in himself. From this evidence, however unsatisfactory it might have been on that occasion, an inference of malice is to be derived. It is obvious that the admission of this evidence would have led the court into a trial of the question as to property in the sheep—a question totally foreign to the issue and of no importance in this case when decided. Besides, the defendant could not be supposed prepared upon this issue to encounter such evidence, nor to prove his property in the sheep, nor even probable cause for supposing them his. The inquiry would have operated as a surprise upon him. Had he pleaded a justification, and offered the record of the former suit with that view, the case would have been different. But that record was offered by way of explanation; the words spoken having a reference to the controversy then pending. 3dly. If the property had been proved most conclusively in the plaintiff, the proof would have furnished no legitimate inference of malice in the defendant to the purpose of enhancing damages. 4thly. Proof of the supposed knowledge in the defendant, (i. e. that the sheep were the property of the plaintiff,) was wholly unnecessary. If the words were spoken, and imported a charge of theft, the law presumes, if no justification be urged, that they were not only false, but known to be so by the speaker. Finally, if proof of such knowledge was proper, the plaintiff was not precluded from exhibiting it. The exception was to the kind of proof. The fact itself was permitted to be proved; and if the evidence did not tend directly to prove it, it was incumbent on the plaintiff to have stated at the trial what the facts and circumstances were upon which he relied, and to set them forth in his exceptions, that the Court might judge of their legal tendency. Whether they were proper to go to the jury as a substitute for direct evidence, or as a ground of inference, depends altogether upon their nature, and unless they appear in the exceptions, it is impossible for the Court to decide, that they were proper for this purpose. As to the suggestion that the defendant was fabricating evidence to support the charge, it evidently means nothing more than that he was preparing for the trial of the “sheep cause,” then pending.

*Peter Starr, for plaintiff.*—*First.* In the action for slander it is the right of the plaintiff to show that the slanderous words charged were spoken and published maliciously by the defendant in

order to enhance the damages. He may prove other words spoken, or acts done by the defendant, to show his malice.—See *Starkie on slander*, 398-9 ; 2 *Stark. Ev.* 869 ; *Chit. Pl.* 383 and 387 ; *Phil. Ev.* 134.

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**Secondly.** The evidence offered by the defendant, viz., the record, &c., in the action of trespass, was offered and admitted to show that there was a controversy between the parties about the time of the speaking of the words, and as proper evidence in that respect to mitigate the damages, and for no other purpose ; and it was the right of the plaintiff to rebut that evidence by any proper evidence, which tended to show malice in the defendant.

**Thirdly.** The fact of malice must in most cases be proved (if proveable at all) by circumstantial evidence. It is not to be expected that a defendant in slandering the plaintiff, will furnish direct and positive evidence of his malicious purpose. Malice is in most cases to be inferred from circumstances.

**Fourthly.** To exclude the evidence offered by the plaintiff, gives to the record, &c., offered by the defendant, an *undue influence*. It being a record in an action of a different nature—it was conclusive of nothing, that did not appear on the face of it. But the rejection of the evidence offered by the plaintiff made the record conclusive upon the *point of malice*.—See 1 *Stark. Ev.* 200 to 202.

**Fifthly.** If the record was proper evidence for the defendant, the admission of it furnished the ground upon which the plaintiff was entitled to rebut the effect of it by any proper evidence, either circumstantial or positive. Is there any case in which a party may not avail himself of circumstantial evidence in support of a fact material to the issue, when it is the best evidence the nature of the case admits ?—See *Phil. Ev.* 169 to 173 ; 1 *Stark. Ev.* 401.

*The opinion of the Court was delivered by*

BAYLIES, J.—Inasmuch as the county court suffered the defendant to give in evidence the copies of records mentioned in the case, to mitigate the plaintiff's damages, the plaintiff to show *malice* in the defendant, and to *enhance the damages*, should have been permitted to give any legal evidence in his power, whether *circumstantial or not*, to show that the defendant, at the several times of accusing the plaintiff, knew that said sheep were not the defendant's, and had good reason to believe they belonged to the plaintiff, and the defendant knew his said charges were false.

As the county court erroneously decided that " an inquiry into



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the right of property upon *circumstantial* evidence for the purpose of inferring knowledge in the defendant, was not admissible,"

A new trial is granted in each of said actions.

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SERENO GIDDINGS vs. EPHRAIM MUNSON.

S. G., being entitled by devise to a share in the real and personal estate of J. G., deceased, by his agent drew an order in favor of C. S. on the executor of J. G., directing him to pay over to C. S. all the right, title, property, interest or demand, which S. G. had under the will of J. G., except eighty dollars and such as was under any legal incumbrance by attachment at the suit of R. And at the same time, (the order being immediately accepted,) said agent took the executor's note for the eighty dollars, and gave him a receipt in full of all the right, title, interest and demand of S. G. under the will, with the like exception on account of R's attachment.

On ejectment brought by S. G. for a part of the real estate which had been severed to his share, in a division directed by the probate court among the devisees,—*Held* that parol evidence was admissible to show that the premises sued for were not included in the settlement made with the executor.

**Ejectment for land in Manchester.** The plaintiff derived title under the will of Job Giddings, his father, who died legally seized and possessed of the premises in question, as part of his home farm, in June, A. D. 1816. In April, A. D. 1816, the said Job made his will, and thereby devised to the plaintiff one equal seventh part of all his estate, real and personal, which should remain after payment of debts, and certain legacies to a small amount, with the charges of settling his estate. He also devised a seventh part to each of his other six children, and appointed Eliphalet Wells, the husband of his daughter Hannah, his sole executor. To the several devises aforesaid the testator added the following clause : " And I further order and direct, that the whole of my home farm be and remain to my daughter Hannah Wells and her husband Eliphalet Wells, provided the said Eliphalet Wells shall, within a reasonable time after my decease, pay to the other heirs mentioned in my will so much as the said Hannah's share shall fall short of the appraisal of said farm ; which reasonable time it is my desire shall be affixed by the judge of probate."

Appraisers being duly appointed, they reported to the probate court an appraisal and inventory of the estate, bearing date the 19th day of August, A. D. 1816, by which it appeared that the home farm aforesaid was appraised at \$2800,00, and the other lands of the testator at \$1400,00. And the personal estate, including rights and credits, was inventoried at about \$2500,00.

\*This case should in course have been reported by *Judge Aikens* in his second volume, but he was not seasonably furnished with the papers.



At a probate court holden on the first Monday of September, **BENNINGTON,**  
**A. D. 1816,** the executor was authorized to make sale of the **January,**  
**1827.**  
 personal estate, and at the same time, on application of the executor for that purpose, a committee was appointed to divide the real and personal estate among the devisees according to the will. The report of said committee, so far as concerned the real estate, was made to the court of probate, accepted and recorded, on the 2d day of February, A. D. 1818; and by that division the premises in question were severed to the plaintiff, as his share in the home farm, at the sum of \$352,94, and his share in the other lands was also designated at the appraised value of \$247,06.

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On the first Monday of March, A. D. 1818, the executor rendered his account of the personal estate, by which there appeared to be a considerable surplus for distribution according to the will; but the share of the plaintiff therein was nearly or quite balanced by his note to the testator.

The plaintiff having adduced proper evidence of the matters aforesaid, and having proved the defendant in possession at the commencement of the action, rested his case.

The defendant claimed to hold under a deed of the said Eliphalet Wells to himself; and in order to show a title in said Wells, gave in evidence a power of attorney executed by the plaintiff, then resident in the state of New-York, to Stephen Martindale, dated the 8th day of July, A. D. 1816, authorizing said Martindale to act as his general agent in all things relating to the settlement of the estate aforesaid, and to execute all necessary papers, as receipts, discharges, and conveyances of real estate. This instrument was not acknowledged nor recorded. The defendant then gave in evidence an order drawn by said Martindale as agent of the plaintiff, in favor of Chade Southwick on said Wells, and the acceptance thereof, which were of the following tenor: "Manchester Nov. 27, 1817. For value received of Mr. Eliphalet Wells, executor to the last will and testament of Job Giddings, late of Manchester deceased, Sir, Please to pay over to Chade Southwick, or his order, all the right, title, property, interest or demand, which *Sereno Giddings* has by virtue of said will, except eighty dollars, and such as is under any legal incumbrance by attachment of Jonathan E. Robinson.

*Stephen Martindale, agent of the said Sereno Giddings.*"

"November 27th, 1817. The above order is accepted by me,

*Eliphalet Wells, Executor.*"

The defendant also gave in evidence a receipt, executed by

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said Martindale to said Wells, of the following tenor: "Manchester, Nov. 27th, 1817. Received of Eliphalet Wells a note of hand bearing even date with this receipt, for the sum of eighty dollars, which sum was excepted in a certain order given by me as agent for *Sereno Giddings*, in favor of Chade Southwick, on the said Eliphalet, bearing date as above mentioned; which, together with the above named note, is in full of all right, title, interest and demand, *Sereno Giddings* has by virtue of a will made by Job Giddings, late of Manchester deceased, except all such as is under any legal incumbrance by attachment at the suit of Jonathan E. Robinson.

*Stephen Martindale, agent for Sereno Giddings."*

It further appeared by the records and proceedings of the probate court in evidence at the trial, that on the 2nd day of August, A. D. 1819, the said Eliphalet Wells signified to said court his election to keep the whole of the home farm, and to pay to the other devisees what the share of said Hannah Wells fell short of the appraised value of said farm. At the same time he moved the judge of said court to appoint a reasonable time for such payment, which was thereupon limited by said judge to three calendar months from the day aforesaid.

The plaintiff called the said Stephen Martindale as a witness, to prove that when said order and receipt were given, it was expressly agreed, and understood, that the premises in question were reserved and excepted out of said settlement, and were not intended to be embraced or included in those papers. This evidence, being objected to, was excluded by the county court, and a verdict and judgement passed for the defendant. And thereupon the plaintiff filed his exceptions, which came up for the decision of this Court, according to the statute.

*After argument, the opinion of the Court was delivered by*

ROYCE, J.—The whole of the testator's home farm, which includes the premises in question, was by the will to belong to Eliphalet Wells and his wife, provided he should, within a reasonable time, to be limited by the judge of probate, pay to the other devisees what her share fell short of the appraised value of said farm. And to show that Wells did thus acquire the title to himself and his wife, at least, as against the plaintiff, the defendant relies on the transaction evidenced by the order and receipt of Nov. 27th, A. D. 1817, as amounting to a payment to the plaintiff in execution of that part of the will.

The parties evidently did not contemplate an arrangement affecting the home farm alone, especially, as Wells had not then signified his election to retain it under the will. But upon the supposition, (the correctness of which we have no occasion to decide,) that payment to a single devisee in full of his interest in the estate generally, though made before the election was signified, would operate without a deed, after the election made, to extinguish the legal interest of such devisee in the farm ; the only question to be determined relates to the evidence offered by the plaintiff and rejected at the trial.

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The objection to the testimony of the witness offered was founded in the rule of law, that oral evidence shall not be received to contradict, vary or control, the evidence of written documents. This rule is universally acknowledged, and we have only to ascertain the extent of its application in the present case. It does not operate to exclude parol evidence where there is any ambiguity or uncertainty, arising from extrinsic circumstances, to be removed ; for some latent reference is then necessarily to be presumed, either from the words employed, or from the subject matter of the stipulation or contract. It does not always follow that a written contract is void for uncertainty, or rendered inoperative by the statute of frauds, though a reference to extrinsic facts and circumstances, which are to influence the operation of the contract, is implied from the writing itself.—*Couch vs. Meeker*, 2 Conn. Rep. 302 ; *Wait vs. Fairbanks*, Bray. 77 ; 1 Mason 9 ; 8 T. R. 379. In the case of *Cole vs. Wendel*, 8 Johns. 90, the defendant had contracted in writing to purchase of the plaintiff certain bank shares, on which 10 per cent only had been paid in, and to pay an advance of 5 per cent on the shares when received. The question was, whether the 5 per cent was payable on the nominal amount of the shares, or on the 10 per cent which had been paid in upon them ; and to determine it, parol evidence, though objected to, had been admitted at the trial. *Spencer, J.* says, in delivering the opinion of the court,—“ The terms of the contract are equivocal, and the ambiguity is a latent one ; as such, and on the strictest principles, the circumstances of the case may be proved and taken into consideration, in determining how far the 5 per cent advance was to be calculated.” It is also a general rule, that when a writing not under seal is given in evidence as containing an admission of a party, he may explain it, and show it to have originated from mistake. Another qualification of the leading principle first stated has been recognized by the English

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courts, and those of New-York, and generally acted on for a few years past in this state. It is, that a receipt for money, or a general discharge unsealed, is not conclusive evidence to the extent of its terms, but is subject to be explained or rebutted by oral testimony.—2 *T. R.* 366; 2 *Johns.* 378; 3 *Ib.* 319; 5 *Ib.* 68; 8 *Ib.* 304; 9 *Ib.* 310. It appears by a note of the case of *Sessions vs. Gilbert*, reported in *Bray.* 75, that this Court formerly held the rule in regard to receipts to be more limited than it is now laid down. But we believe the distinction there taken has not been followed to any considerable extent, and that the more liberal doctrine contained in the authorities referred to has the general approbation of the profession. And considering that such instruments are daily executed with little or no attention to the comprehensive import of the terms employed, we think a liberal rule of evidence on the subject is required for the furtherance of justice.†

There is a looseness and inaccuracy of expression in the two instruments given in evidence in this case, by which it is left in some degree uncertain to what extent they were intended to operate. While the terms of the order admit a construction extending to the payment for real estate, their more obvious application is to such rights and claims as are usually extinguished by payment, or to such kinds of property as might be transferred by delivery to the holder of the order. And this uncertainty is much increased by the exception contained in both instruments, of such estate as was legally incumbered by Robinson's attachment. No description is given of the property attached, nor estimate of its value, nor is any provision made in case the attachment should be dissolved, or the incumbrance removed. The usual office of an exception or reservation is, to save or keep back something to the party who passes or discharges a right; but by the use of the word "legally" in this instance, the intended effect of the exception is rendered vague and uncertain. Whether that expression had reference to the validity of the attachment for the time being; or to its ultimate effect on the title of the estate attached; and whether on failure of the attachment to hold the estate, the exception was to restore it disencumbered to the plaintiff, or to enlarge the benefit of the settlement to the executor, is not readily discovered from the papers alone.

It may be further remarked, that the order and receipt were

[See the same doctrine recognized in *Burnap vs. Partridge*, 3 *Vt. Rep.* 147-8.  
*Reporter.*

executed, and the order accepted, at the same time ; and taken together, they amount to nothing more, upon any construction of them, than a receipt in full, or acknowledgement of satisfaction, for the plaintiff's interest in the estate. They furnished therefore but *prima facie* evidence that he had been fully paid.

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On these grounds we think the plaintiff was entitled to give the explanation which he attempted at the trial, and that the evidence offered for that purpose should have been admitted.

Judgement of the county court reversed, and a new trial granted.

*Sheldon & Sargeant*, for plaintiff.

*Bennet & Aiken*, for defendant.

ELISHA EASTMAN vs. ABRAHAM POTTER.

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Where the endorsee of a promissory note payable in specific property, demanded payment of the maker, at the time and place designated, without having the note with him, and the maker refused to pay it—it was held that for such laches of the endorsee the endorser was discharged.

This was an action on the case endorsee against endorser of a note payable in grain in January, 1830, executed by Peleg Eddy to *Abraham Potter*, and by *Potter* endorsed to plaintiff. On the trial the plaintiff introduced evidence tending to prove a demand of the grain, at the time and place of payment, which was at the dwelling house where the defendant resided ; that the defendant being present, notice was given him of the nonpayment ; and that the defendant denied he had endorsed the note. The defendant introduced evidence tending to prove, that the plaintiff had not the note with him either at the time of making the demand, or giving the notice, and that at the time he denied endorsing the note, he *called on the plaintiff to produce it*. The plaintiff requested the court to charge the jury, that it was the duty of the maker to pay the grain, and set it apart at the time and place of payment, whether the note was present or not ; and that it was not necessary for the plaintiff to have the note with him at the time of giving notice of non-payment ; that if the defendant denied he had endorsed the note, it was a waiver of the necessity of having the note present. But the court charged the jury, that it was the duty of the maker of the note to pay the grain at the time and place of payment, whether the holder was present with the note or not ; but that to charge the endorser, it was the duty of the holder to

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present the note at the time and place, when and where it became payable, and demand payment thereof; and if not paid, he must give notice thereof to the endorsee; and if the jury found that the plaintiff had not the note with him at the time of making the demand, and also at the time of giving the notice, it was not a valid notice; that if the defendant denied endorsing the note, it was a waiver on his part, unless he at the same time required the plaintiff to produce the note; that if the jury found he denied endorsing the note, but at the same time called on the plaintiff to produce it, it did not amount to a waiver on his part to have the note present, and it was incumbent on the plaintiff to have had the note present, or the defendant would not be liable. The jury found a verdict for the defendant. The plaintiff excepted to the charge of the court; and a bill of exceptions stating the foregoing facts having been allowed, the case was brought to this Court on a motion for a new trial.

*Thrall, for plaintiff*, contended, that it was not necessary the note should have been actually present at the time of making demand of payment of the maker. That the defendant's denying having endorsed the note was a waiver on his part to have the note present, though he at the same time called on the plaintiff to produce it.

*Ormsbee, for defendant*.—The endorsee of a note not negotiable must follow the rules of the law merchant in making a demand of payment and giving notice of non-payment in a seasonable time.—*Aldis and Gadcomb vs. Johnson*, 1 *Vt. Rep.* 136. When a particular place of payment is fixed upon in an instrument, the instrument upon which the debt is predicated must be presented at that place for payment, before the holder has a cause for action.—*Sanderson vs. Barnes*, 14 *East*, 500; *Dickinson vs. Barnes*, 16 *East*, 110. Whenever a demand of payment is made, the person making the demand should have with him the evidence of the debt; and this rule especially applies to negotiable securities.—7 *Mass.* 486, *Freeman et al. vs. Boynton*. Where the place of payment is fixed by law, the same reason exists for a demand being made at that place as in the case where the place of payment is fixed upon by the parties. The reason why the instrument, which is the evidence of the debt, should be present in the hands of the person making the demand, at the time and place of making it, ready to be delivered up upon payment, is strong in the case of

an endorser, because he would require the instrument to enforce his claim against the maker. It is still stronger in the case of an action brought against an endorser of a note payable in specific articles ; because at the time of the demand being made, he would have a right to pay in such specific articles, and to have his note delivered up on such payment. Where an endorser denies having endorsed the note in question, it ought to be presented in order that he may convince himself as to the fact of its being his endorsement or not.

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BAYLIES, J., *delivered the opinion of the Court.*—In the case of *Aldis & Gadcomb vs. Johnson*, (1 *Vt. Rep.* 136,) it was decided, that the endorsee of a note not negotiable must follow the rules of the law-merchant in making demand of payment and giving notice of non-payment in a reasonable time. Then let us apply these rules to the note in question, which was payable in grain in January, 1830, at the defendant's dwelling house. The note was executed by Peleg Eddy to *Abraham Potter*, and by *Potter* endorsed to the plaintiff. The plaintiff appeared at the time and place the note was payable, ready to receive the grain, but had not the note with him to show his authority to receive the grain, nor to deliver up, in case payment had been made. The question is, was this neglect of the plaintiff, to have the note present, at the time and place of payment, a discharge of the defendant, who is sued as endorser by the endorsee? In the case of the *U. S. Bank vs. Smith*, (11 *Wheat.* 171,) the court say, "The plaintiffs, to entitle them to recover, were bound to show that they were the endorsees and holders of the note ; *that the note was at the bank, where it was made payable, at the time it fell due* ; that the maker had no funds there to pay the note ; and that due notice of the default of the maker was given to the defendant." From this decision, I infer that the neglect of the plaintiff to have his note present at the time and place of payment, was a discharge of the defendant from his liability. In support of this opinion there are the following additional authorities.—*Ambrose vs. Hapwood*, 2 *Taunt.* 61 ; *Callaghan vs. Aylett*, 3 *Taunt.* 397 ; *Bowes et al. vs. Howe*, in error, 5 *Taunt.* 30 ; *Bank vs. Jones*, 6 *Mass.* 524 ; *Freeman et al. vs. Boynton*, 7 *Mass.* 483 ; *Woodbridge et al. vs. Brigham et al.* 13 *Mass.* 557.

The judgement of the county court  
is affirmed with additional costs.



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CALEB HALL vs. JOHN COLLINS.

When one claims title to land under the vendue-deed of a collector of taxes, he must prove that the several essential things required by law to be done previous to the sale, have been performed accordingly.

The recitals in a collector's deed are not evidence of what has been done by other persons previous to its execution ; and

*Quære*, whether such recitals are evidence of the doings of the collector himself.

This was an action of ejectment to recover the possession of lands in Tinmouth, and was brought up to this Court on the following bill of exceptions :

“ Upon the trial of the cause before the county court, A. T. 1830, the plaintiff claimed title to the premises in question by virtue of an attachement, judgement, and levy of an execution, in his favor against one John Collins, jun. Said execution, dated 20th November, 1827, and levied by I. Dike, jr. Esq., sheriff, on the 4th day of January, 1828 ; which levy was not objected to by the defendant. The plaintiff then offered in evidence a copy of a deed from Isaac Burton, as collector of internal duties for the first collection district of Vermont, under the act of Congress of March 5th, 1816, to Daniel Douglass, dated 4th June, 1819, acknowledged same day, and recorded 21st September, 1819 ; and a copy of a deed from Douglass to John Collins, jr., dated and acknowledged 21st June, 1819, and recorded 21st September, 1819 ; which said deeds are made a part of the case. To the admission of these deeds the defendant objected, unless the plaintiff should prove the provisions of said act of congress, as to the sale of the lands mentioned in Burton's deed, complied with. But the court overruled the objection of the defendant, and admitted the said deeds to be read as evidence to the jury to prove the title of the lands in question in the plaintiff, without such proof ; and they were read by the plaintiff. The defendant then gave in evidence to the court and jury a copy of a deed of said lands from John Collins, jr. to Eastus Barker, dated and acknowledged 21st September, 1819, and recorded 22nd September, 1819. The plaintiff then offered in evidence to the court and jury a copy of a writing, the original of which was signed E. Barker, and without any date, as evidence to prove that thereby the said deed from Collins to Barker had become a mortgage ; which said last mentioned deed and copy of said writing are made a part of the case. To the admission of which said copy of a writing the defendant objected, upon the ground that the same having been executed subsequent to the deed from Collins to Barker, and not a part of the same transaction, could not create a defeasance, and was in itself unmeaning. But the court overruled the objection, and admitted the writing to be read as evidence to the jury on the part of the plaintiff, for such purpose. The defendant then offered in evidence to the jury an execution, levy of the same, and prior attachement of the lands

in question, in favor of Rathbone and Vaughan, against said John Collins, jr. ; which said attachment and levy were prior to the plaintiff's attachment and levy. The levy was made by the constable of Tinmouth, on the 4th day of July, 1827. To the admission of which the plaintiff objected, and then and there proved that the justice of the peace who appointed the appraisers who appraised the lands on the said execution, was within the fourth degree of affinity to William Vaughan, one of the firm of Rathbone and Vaughan ; and, thereupon, the court rejected the levy, and refused to allow the same to go to the jury as evidence of title in the said Rathbone and Vaughan. The jury found a verdict for the plaintiff."

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*Copy of the collector's deed :—*" To all people to whom these presents shall come, Greeting : Know ye, that I, Isaac Burton, of Manchester, in the first collection district within the State of Vermont, and collector of internal duties for the United States of America for the district aforesaid, did, at Manchester aforesaid, on the twentieth day of November, 1816, receive from the principal assessor for said district, a certified copy of a list by him made out of all the property in said district subject to the tax assessed by the act of Congress of the United States, passed on the 5th day of March, 1816, with the portion thereof owned, or superintended, by each person in said district, with the sum of said tax due thereon, and the person owning or occupying the same. And I, the said collector, within ten days after receiving such list, did advertise in one newspaper, to wit, the Rutland Herald, printed in said district, and posted up notifications in four public places in said district, giving notice that said tax had become due and payable, and stating the times and places at which I would attend, within twenty days after such notification, to receive said tax, and after the said times, stated as aforesaid, and within sixty days after the receipt of said collection list, as aforesaid, I applied at the dwelling house of each person in said district who had not paid his or her tax, and then demanded the same ; and after twenty days from the time of making such demand of each person respectively, as aforesaid, I proceeded to collect said tax of the several persons then delinquent in the payment of the same, by distress and sale of the goods, chattels and effects of each person, so delinquent as aforesaid ; and I could not find goods, chattels and effects of the person owning, occupying, or superintending, the parcel of land and buildings hereafter described, sufficient to satisfy the tax upon the same : whereupon I gave publick notice, by a notification advertised in a newspaper, to wit, the Rutland Herald, printed in said district, and posted up in ten public places in said district, that I should sell the same lands and buildings at the dwelling house of Isachar Reed, in Rutland, in said district, on the 20th day of May, 1817, at public vendue, to the highest bidder, or so much thereof as would pay said tax, together with the addition of twenty *per centum* on said tax, due upon said land and

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buildings ; which day of sale was more than thirty days after the advertising and posting up notifications of such sale as aforesaid. And at the said time and place of sale, so notified as aforesaid, the said tax on said land and buildings not being then paid, I exposed the same for sale at public vendue, and sold to Daniel Douglass of Rutland, in the State of Vermont, for the sum of *one dollar and seventy five cents*, the following piece of land and buildings, thereon, to wit, *ONE HUNDRED and FIFTY ACRES* of LAND lying and being in the south east part of Tinmouth, and is bounded as follows, (viz.) north by land owned by Girly Marsh of Clarendon ; East on Wallingford west line ; south on Nathaniel Chipman ; on the west by Spencer Nicholson ; it being all the land set in said collection list to John Collins of Tinmouth, in said district. And the said Daniel Douglass then offering to pay the tax then due from said John Collins of Tinmouth in said district, and *twenty per centum* thereon for the least quantity of said property of any person bidding ; and two years having elapsed since said sale, and no person having paid or offered to pay to me the said sum paid said purchaser, as aforesaid, with interest thereon, at the rate of *twenty per centum per annum* for redemption of said property ; Therefore, for the consideration of the said sum of *one dollar and seventy-five cents*, so paid by said Daniel Douglass, as aforesaid, I do in my said capacity of collector, as aforesaid, give, grant, sell, convey and confirm unto the said Daniel Douglass, his heirs and assigns forever, the premises above described as having been sold as aforesaid.

To have and to hold the above granted premises with all the privileges and appurtenances thereof to him the said Daniel Douglass, his heirs and assigns, to his and their own use, benefit and behoof forever. And I hereby covenant and agree with the said Daniel Douglass, his heirs and assigns, that I, in my said capacity, had and have good right to sell and convey the same premises as aforesaid. Provided nevertheless, if said premises belonged to any infant or infants, persons of insane mind, or beyond sea, or to any married woman or women, at the time of such sale, and such person or persons shall within two years after such liability be removed, or their return from beyond sea into the United States, pay to the clerk of the district court for the Vermont district, the said sum paid by said Daniel Douglass for said premises, a compensation for all the improvements he may have made on said premises subsequent to his purchase, the value of said improvements to be ascertained by three or more neighbors, freeholders, to be appointed by said clerk, and assess the said value on oath, and an actual view of said improvements, and make return thereof to said clerk, said premises shall revert back to said original owner or owners, and from that time forward this deed shall be null and void, otherwise to remain in full force and virtue forever.

In testimony of all which, I, in my said capacity, hereunto set my

hand and seal this fourth day of June A. D. 1819, and in the independence of the United States the forty third year.

In presence of us, *Isaac Burton, Collector.*" [L. s.]  
*Saml. C. Raymond,*  
*Wm. P. Black.*

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*United States of America,* } At Manchester, in the county of  
*Vermont district, to wit,* } Bennington, within the said district  
 and State of Vermont, on the fourth day of June, 1819, the said  
 Isaac Burton personally appeared and acknowledged the foregoing instrument by him sealed and subscribed, to be his free act and deed.

Before me

*Samuel C. Raymond, Justice Peace.*

*Clark, for defendant.*—The first point in this case depends on the validity of a deed from Isaac Burton, as a collector of internal duties, under the act of congress of March 5th, 1816.—See *the act in laws of 1816, p. 12, which refers to the laws of 1815, c. 21, p. 35.* In the 26th section of the last mentioned act, (1815, p. 46 and 47,) the duties of the collectors are pointed out so far as relates to the requisite duties of collectors before they can resort to the sale of real estate of any delinquent, for the payment of taxes. And it is contended that no case could have occurred under the act, until each and every pre-requisite which was required by law, had been exactly complied with and performed by the collector. The 27th section, (p. 48, of the laws of 1815,) directs the collectors as to the necessary newspaper advertisements, and notifications to be posted up, before any actual sale of lands can legally be made. This also, it is insisted, must be strictly pursued; and if the collector fails to do so, and sells, the sale is void. The collector has no general, but a special authority, to sell lands for taxes in particular cases mentioned in the act. Those cases must exist, or his power does not arise. It is a mere naked power not coupled with an interest. The collector must pursue the power, or his act will not be sustained by it.—4 *Cranch*, 403, *Stead's Executors vs. Course*; 9 *Cranch*, 64, *Parker vs. Rule's Lessee*; 4 *Wheaton's Rep.* 77, *Wil'iams et al. vs. Peyton's Lessee*. By the authorities above cited it seems to be entirely settled by the Supreme Court of the U. S., that all the pre-requisites of an act assessing a tax upon lands, must be strictly observed and pursued by the collector; otherwise, the sale (and, of course, the deed,) would be of no validity, and *void*, because a case would not have otherwise occurred in which a collector would have power by the act to sell. The case in the 4th *Cranch* was one which

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arose under the tax laws of Georgia for 1790 and 1791. The case in the 9th *Cranch* arose under the act of Congress of July 14, 1798, imposing a direct tax. And the case in the 4th *Wheaton* was an action of ejectment brought by the original patentee in the circuit court for the district of Kentucky, against a purchaser at a sale made for the non-payment of the direct tax imposed by the act of Congress of the 14th July, 1798, and came up to the Supreme Court of the U. S. upon a writ of error. The defendant, (*Peyton*) in that case stood precisely in the situation of the plaintiff, (*Hall*), in this case; both resting their title upon the validity of a collector's sale for taxes, and deed, under the two acts of Congress, the provisions of which were precisely similar. The 26th and 27th sec. of the act of 1815, altered by the act of 1816, is for every legal purpose an exact copy of the 9th, 10th and 13th sec. of the act of 1798;—(See 4th *Wheaton*, 80 and 81,) and both are directory to the collector as to the sales in the respective acts. In all the cases above cited, the principle is decided, that to make a collector's deed of any validity, it must be proved upon the trial that every pre-requisite of the law has been performed by the collector before the sale of the lands; and that the *onus probandi* is upon the vendee, and all who seek to claim under him. And it was decided in the case of *Ronkerdorf vs. Taylor*, 4 *Peter's Rep.* 349, (cited in the *American Jurist*, no. 8, p. 381,) that no presumption is raised in behalf of a collector who sells real estate for taxes, and the proof devolves upon the person who claims under the collector's sale. The Supreme Court of the U. S. having given a construction to the laws of congress upon which all the foregoing cases depended, (except the one in the 4th *Cranch*,) and having a right to construe those laws, it is insisted that the state courts are not at liberty to construe them differently in a similar case.

If the plaintiff in this case should contend that the recitals in the deed is evidence for him to prove the proceedings of the collector previous to the sale, then it is answered, 1st. That the recitals in the deed from Burton to Douglass fell very much short of complying with the act under which the sale was made; which will be easily perceived by comparing the recitals with the 26th and 27th sec. of the act of 1815. 2nd. If the recitals of the deed were perfect, still it is not even *prima facie* evidence of the facts intended to be proved by them. The party claiming under such deed must prove, independent of the recitals in the deed, that all the previous acts have been performed. It was substantially so

decided in all the cases above cited ; and expressly so decided in February, 1827, by the Supreme Court of the State of New-York, in the case of *Jackson, Cook and others vs. Shephard*. See 7 *Cowen's Rep.* 88. This was a case arising under the act of Congress of July 22d, 1813, the 21st and 22d sections of which are directory to the collector, and are nearly *verbatim* with the sections for the same purpose in the act of 1798 and 1816.

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By the foregoing authorities it seems to be settled law, that a party seeking to hold under a collector's deed, must fortify his title by proving, *independent of the collector's recital in his deed*, "that the previous acts have all been performed ; that a purchaser at a collector's sale must see to it that those acts have been strictly pursued ; that he must preserve the evidences of them as necessary to preserve his title. He can easily do this by preserving the *Gazettes*, notifications, &c. It would be always difficult, and sometimes impossible, for the original owner to prove the negative. It is a case on the part of the purchaser which ought not to be favored." And surely, in this case, where Douglass purchased at the collector's sale 150 acres of land for \$1,75, there can be no equity in his holding it against a person who has laboured many years to acquire it ; for there are no lands in Tinmouth of such trifling value. If the principles be sustained, the county court erred in admitting the deed in question, (without the proof required by the defendant,) as evidence to prove an absolute, or even a *prima facie*, title in the plaintiff, and, of course, the deed from Douglass to John Collins, Jr. conveyed no title, and the plaintiff gained nothing by the levy of his execution ; and a new trial ought to be granted.

But if the court should even decide differently upon the first point, then the defendant contends, 2nd. That the case shows, that, if John Collins, Jr. acquired any title by virtue of his deed from Douglass ; that he had conveyed all his right to Eastus Barker, previous to the levy of the plaintiff's execution, or the service of his writ,—that the deed from John Collins, Jr. to Barker proves the title out of the plaintiff. For it is contended, that the writing, unexplained or supplied by any other evidence, does not amount to a defeasance to the deed to Barker from John Collins Jr. ; that of itself it is perfectly unmeaning, vague, and unintelligible. No definite application can be gathered from it. Whether it was competent for the plaintiff to have rendered this paper applicable to the case by *parol* upon the trial or not, is a question not now to be decided in this court. 3rd. It is apparent from the writing,



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as vague as it is, that it was a subsequent transaction to the deed, and not a part of it, and therefore could not create a defeasance of itself. See 1 *Swift's Dig.* 133, no. 8; 2 *do.* 163; 3 *Salk.* 241; 5 *Bac. Abr. (B)* 6, 8, 9, and 10. 4th. The defendant proved upon trial the title in Rathbone and Vaughan, by virtue of an attachment and the levy of an execution in their favor against John Collins, Jr., which attachment and levy were prior to the attachment and levy of the plaintiff, which ought to have defeated the plaintiff's right of recovery, unless it was competent for the plaintiff to prove upon that trial, that the justice who appointed the appraisers upon the execution of Rathbone and Vaughan was within the 4th degree of affinity to William Vaughan, one of the firm of Rathbone and Vaughan. It is contended by the defendant, that the lands were not set off to the firm of Rathbone and Vaughan as partners in co., and not to either individually; and further, that it was not competent for the plaintiff to form an issue to decide whether the justice was within the 4th degree of affinity to William Vaughan or not in that collateral manner. And that still if the appraisal was fair, and without fraud, the title was consummated, &c.

*Royce and Hodges, for the plaintiff.*—The general rule, that when third persons are interested in the proceedings of an officer, both the validity of his appointment and the correctness of his proceedings shall be presumed, is supported by all the authorities upon the subject. It has been recognized in this state, especially in cases of sales of personal property on execution, levy of executions upon real estate, and sales thereof upon collector's warrants. It is objected, however, that this presumption is not raised in favor of officers appointed for special purposes. But the most rigid investigation of the cases will not furnish a single reason for the general rule which has not the same force and bearing in this instance. The officer is equally the creature of the government, the agent of the people, and among others of the parties, and if guilty of neglect, is equally responsible to those injured. As between him and them, he ought perhaps to be held to strict proof of the legality of his proceedings. But when third persons are concerned, the burden of proving his neglect should be thrown upon the party alleging it. And why may not individuals put as much faith and confidence in those officers who are selected for special purposes, as in those who discharge the ordinary functions of government? As to the forms prescribed by the act lay-



ing this tax, (which after all are merely directory,) it is at any time more difficult for the purchaser to establish a compliance than for the party whose estate is sold to prove the omission of any important requisite. In practice it is impossible for the purchaser either to ascertain the correctness of the officer's proceedings prior to the sale, or to regulate them afterwards. He can only trust to the faithfulness of the officer whom the government has appointed and controls. The land owner, on the other hand, has the proceedings upon one estate only to investigate, and his attention is called to the subject by repeated advertisements which he is bound to notice. He can easily ascertain and prove any fatal negligence, and ought to apprise the purchaser thereof, when he finds that his land is exposed for sale. And if he permits it to be sold without remonstrance, he should be treated in the same manner as if he had permitted the purchase of an estate without giving notice of his having claims or incumbrances thereon. Again, as the officer makes no return of these proceedings, it follows that, unless this deed be considered one, so far as to be *prima facie* evidence of the facts recited, the title to the real estate is not merely liable to be affected by parol evidence, but depends entirely upon it. The writing objected to was not offered as a defeasance, but as evidence of trust, which made the deed then in question a mortgage. And a mortgage cannot be set up by a stranger to show title out of the mortgagor in an action of ejectment.—*Adams vs. Jackson*, 2 Aik. 145; *Beattie vs. Robin*, 2 Vt. Rep. 181; *Proprietors vs. Ransom*, 14 Mass. 145; *Blossom vs. Cannon*, 14 Mass. 177; *Powell vs. Milbane*, 3 Wils. 355, and cases cited; 3 Stark. Ev. 1249, and cases cited; *Hazard vs. Martin*, 2 Vt. Rep. 77; *The King vs. Haslingfield*, 2 M. and S. 558; \* \* \* \* of *Harriss et al. vs. Bodenham et al.*, 9 B. and C. 495; *Ewer vs. Corbet*, 2 P. Wms. 148; 4 Kent's Com. 153, 154, and cases cited; *Staunton vs. Banister*, 2 Vt. Rep. 464.

BAYLIES, J., delivered the opinion of the Court.—We are called upon to consider the effect of a vendue deed, executed by Isaac Burton, collector of taxes, to Daniel Douglass, on the 4th of June, A. D. 1819, which deed is made part of the case, and is marked A.

The power of Isaac Burton, as collector, to convey the land in question, to satisfy the taxes, may be learned in the opinions of the Supreme Court of the United States, expressed in the cases refer-

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red to by the defendant's council. In the case of *Stead's Executors vs. Course*, 4 Cranch, 403, the court say, "It would be going too far to say that a collector, selling land with or without authority, would, by his conveyance, transfer the title of the rightful proprietor. He must act in conformity with the law from which his power is derived, and the purchaser is bound to inquire whether he has so acted. It is true that full evidence of every minute circumstance ought not, especially at a distant day, to be required. From the establishment of some facts, it is possible that others may be presumed, and less than positive testimony may establish facts. In this case, as in all others depending on testimony, a sound discretion, regulated by *the law of evidence*, will be exercised. But it is incumbent on the vendee to prove the authority to sell; and the question respecting the fairness of the sale will then stand on the same principles with any other transaction in which fraud is charged."

In the case of *Parker vs. Rule's Lessee*, in 9 Cranch 64, the court decide, that under the act of Congress to lay and collect a direct tax, (passed July 14, 1798,) before the collector can sell the land of an *unknown* proprietor, for the non-payment of taxes, it is necessary, that he should advertise the lists of lands on which taxes have not been paid, and the statement of the amount due for the tax, and the notification to pay, for 60 days, in four gazettes of the state, if there be so many.

In the case of *Williams et al. vs. Peyton's Lessee*, 4 Wheat. 77, the court in their opinion say, "This is an action of ejectment brought in the circuit court for the District of Kentucky, by the original patentee, against a purchaser, at a sale made for non-payment of the direct tax, imposed by the act of Congress of the 14th of July, 1798, c. 92. As the collector has no general authority to sell lands at his discretion for the non-payment of the direct tax, but a special power to sell in the particular cases described in the act, those cases must exist, or his power does not arise. It is a naked power, not coupled with an interest; and in all such cases, the law requires that every pre-requisite to the exercise of that power must precede its exercise; that the agent must pursue the power, or his act will not be sustained by it."

"This general proposition has not been controverted; but the plaintiffs in error contend, that a deed executed by a public officer is *prima facie* evidence that every act which ought to precede that deed had preceded it; that this conveyance is good, un-

less the party contesting it can show that the officer failed to perform his duty."

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"It is a general principle, that the party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act *in pais*, the party claiming under that deed is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which its validity might depend. It forms a part of his title; it is a link in the chain, which is essential to its continuity, and which it is incumbent on him to preserve. These facts should be examined by him before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title. If this be true in the general, is there any thing, which will render the principle inapplicable to the case of lands sold for the nonpayment of taxes? In the act of Congress, there is no declaration that these conveyances shall be deemed *prima facie* evidence of the validity of the sale. Is the nature of the transaction such, that a court ought to presume in its favour any thing, which does not appear, or ought to relieve the party claiming under it from the burthen of proving its correctness?"

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"The duties of the public officer are prescribed in the 9th, 10th, and 13th sections of the act of the 14th of July, 1798, c. 92. If theses duties be examined, they will be found to be susceptible of complete proof on the part of the officer, and consequently on the part of the purchaser, who ought to preserve the evidence of them, at least, for a reasonable time. It is the peculiar province of this Court to expound the acts of Congress, and to give the rule by which they are to be construed."

The above reasoning will apply to the case at bar, which arises under the act of Congress laying a direct tax upon the United States of six millions of dollars, for the year one thousand eight hundred and sixteen, and for succeeding years, passed Jan. 9, 1815; and the act to reduce said tax to three millions of dollars, passed, March 5, 1816.

Before the collector could give a valid deed under the act of 1815, there were several essential things to be done by the secretary of the treasury, principal assessors, assistant assessors, and the collector. To make out a title in the plaintiff under the collector's deed, it must be proved that "the several essential things to be done," were done previous to the execution of the deed. And the question is as to the mode of proof.

Can the plaintiff prove by a written certificate of the collector,

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that these prerequisites were performed? The collector is not by any law made a certifying officer for the purpose; therefore, his certificate of the facts would be no better evidence of them, than the certificate of any other credible person not upon oath: such certificate, whether inserted in the collector's deed, or not, is not evidence to prove that the prerequisites have been performed.

In the deed (marked A) Isaac Burton, the collector, has recited several essential things to have been done. Now, are these recitals legal evidence of the facts, so as to make the deed *prima facie* evidence of title in Daniel Douglass, the grantee? "The rule of law is, that a deed containing a recital of another deed is evidence of the recited deed against the grantor, and all persons claiming by title derived from him subsequently: but such recital is not evidence against a stranger, nor against one, who claims by title derived from the grantor before the deed, which contains the recital."--(See 1 Stark. Ev. 369 n. 1, and the cases there referred to.) Moreover, "a recital will not operate as an estoppel, or as evidence, against one, who was neither a party to the deed, nor claims under a party."--(See 2 Stark. Ev. 23, and the cases there referred to.) According to these principles, the recitals in the deed (marked A) cannot affect the title of John Collins, who is no party to the deed, and was the owner of the land in question, when it was sold for taxes. I state this as my opinion. But the Court in deciding the case, did not decide, that the recitals in the deed were, or were not, evidence of the doings of the collector, who gave the deed; but they decided, that the recitals were not evidence of the doings of other officers concerned, and the deed was not *prima facie* evidence, that the title to the land in question had been conveyed to Daniel Douglass, the grantee. Upon this ground, a new trial is granted in this action. The defendant is to recover his costs at this court; his other costs to wait the event of the suit.

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Where the official signature of a town-clerk was subscribed to that part of the certificate on the back of a deed, which related to the receipt of the deed into his office for record, but not to the following part which certified that the same was recorded in a particular book and page—the whole certificate being evidently in the hand writing of the town clerk,—such deed was held to be admissible in evidence.

Such town-clerk may add his name to such certificate at any time.

If mortgagee, after condition broken, assign to B, and mortgagor cuts timber, and leaves it upon the premises till after B takes possession, the mortgagor cannot maintain trover against B for his using this timber.

This action came up from the county court upon the following bill of exceptions, to wit :

“ This was an action of *trover* for spruce mill logs, cedar logs and rails, and cooper-stuff. Plea, the *general issue*, and trial by jury.

It appeared in evidence that, in the winter and spring of 1830, the plaintiff's intestate cut a considerable quantity of cedar-rail timber, together with several spruce mill logs, and about one cord of cooper-stuff, upon the farm where he then lived, and drew and placed the same along the road side upon said farm, part of the cedar timber being split into rails ; that, in May or June, 1830, when he had left said farm, and the defendant had entered into possession of it, he went upon the farm and demanded said property of the defendant, who forbade his taking the same away, claiming himself to be the owner of it ; that, after this, and before the action was commenced, the defendant appropriated a part of the property to his own use. The defendant gave in evidence a deed from Levi Stevens to Robert P. Johnson, of a part of said farm, and one from said Stevens to the plaintiff's intestate, of the other part, both dated February 16, 1826, and a mortgage deed from said Robert and the intestate to Stevens, of the same date, conditioned for the payment of sundry notes, amounting to about two thousand dollars, part of which had fallen due previous to November 21, 1829, and no part of which appeared to have ever been paid. The defendant then offered in evidence a deed of said farm from Stevens to himself, dated Nov. 21, 1829 ; to the admission of which the plaintiff objected, alleging that the endorsement of the town clerk upon the back of said deed, was not a sufficient certificate of the recording of the same. The official signature of the town clerk was subscribed to that part of the certificate relating to the receipt of the deed into his office for record, but not to the following part which certified the book and page where it was recorded. It being evident by inspection, that the whole certificate was in the hand writing of the town clerk, the court overruled the objection, and the deed was admitted. There was evidence in the case tending to show, that, when the last deed was executed, Stevens agreed with the defendant, that the

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intestate should leave said farm by the 1st of May, 1830, and that, soon after, a settlement was had between Stevens and the intestate in relation to said farm, (though it did not appear that any acquittance of the equity of redemption was executed,) when the intestate, being made acquainted with said agreement between Stevens and the defendant, assented to the same, and agreed to quit the farm by the time aforesaid. There was also evidence tending to show, that, soon after the defendant's purchase of said farm as aforesaid, the intestate applied to him on one occasion for permission to cut a few sticks of timber for a particular purpose, not connected with the cutting of the timber in question; which permission the defendant gave. The court charged the jury, that the defendant might lawfully forbid and prevent the intestate from taking away the timber and rails cut upon said farm after the conveyance thereof from Stevens to the defendant. Verdict and judgement for defendant. To the admission of the deed aforesaid, and to so much of the charge as is above expressed, the plaintiff excepts," &c.

*Bell and Mattocks, for plaintiff,* contended, that the certificate of the town clerk upon the deed to the defendant, as described in the bill of exceptions, was no evidence, that the deed had been recorded. They also contended that the charge of the court was incorrect; for that the plaintiff's intestate, being mortgagor, and there having been no foreclosure of the equity of redemption, had a right to cut timber on the premises; that he had the paramount title to the land. The intestate was also in possession when a greater part of this timber was cut. And, even suppose the agreement with defendant was made as alleged, *Johnson* was to remain in possession till the first of May, 1830, before which the part of the timber, cut last, was cut,

*Young and Hill, contra.*—1st. That the deed in question was received into the town-clerk's office on a certain day, and filed for record, is beyond dispute, because of the official signature of the town-clerk. Now there is no good reason, why the indorsement of its being recorded in the hand writing of the same town-clerk immediately following his signature, is not equally evidence of its being recorded; and as much so as though the signature followed the indorsement. It is believed that, showing the endorsement to be the hand writing of the town-clerk, is good evidence of the deed being recorded, whether his signature accompany it or not, if it appear to have been done in his office; or whether it be placed at the commencement, or the conclusion, of the indorsement. In fact, the official signature of the town clerk is only evi-

dence of the indorsement's being in his hand writing, which, when established, is a certificate sufficiently authentic for all legal purposes in this state.—1 *Stark. Ev.* 367 ; 3 *Jac. L. Dic.* 457 ; 1 *Johnson's adm. vs. McGuire.* ORLEANS, March, 1832.

The 2nd. objection is to the charge of the court.—The right to possess the premises in question was in Levi Stevens, at the date of his deed to the defendant, by reason of the breach of the condition of the intestate's and *Robert P. Johnson's* mortgage to said Stevens. *Rev. Stat.* 96. So that, in the absence of Stevens' deed to the defendant, the intestate was substantially a trespasser on the right of Stevens, and was liable to an injunction to stay waste. The defendant by his deed succeeded to all the rights of Stevens, together with the undertaking of the intestate, to surrender him actual possession according to the agreement of Stevens with the defendant mentioned in the bill of exceptions. Now the intestate knowing, and consenting to, the defendant's purchase, and agreeing to give possession in accordance with it, renders him a much broader trespasser on the rights of the defendant ; and the court well charged the jury, that the defendant might lawfully forbid and prevent the intestate taking away the timber and rails, cut on the land after the date of the defendant's purchase. In this case the mortgagors were seized but for an instant, taking an absolute estate in fee, and rendering back a conditional estate in fee : the execution of these deeds, being of even date, was done at the same instant, and therefore constitute but one act. The land consequently was never vested in the mortgagors ; (4 *Mass. Rep.* 566 ;) but remained in Stevens as though no deed had ever passed from him, the condition not having been performed.—2 *Bl. Com.* 113, note 7. The legal title and the right of possession to the land was in the defendant at the time the timber was cut, and his title perfected by possession in fact, at the time of the injury complained of ; so that the defendant was justifiable in treating the intestate as a stranger, and virtually a trespasser. 1 *Sw. Dig.* 514. The doctrine is most reasonable and fully sustained, that the defendant had a right to detain in his possession the timber and rails wrongfully cut and severed from his land.—3 *Bl. Com.* 3 ; 1 *Chit. Pl.* 139, 161. Under the circumstances of this case, the intestate, by his assent to the defendant's purchase, is estopped from setting up his right to cut the timber in question : and this assent is fully shewn by the fact, that he yielded possession agreeably to the terms of the defendant's purchase ; and by



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his application to purchase timber of the defendant, as appears by the bill of exceptions.

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HUTCHINSON, C. J., *delivered the opinion of the Court.*—The deed from Stevens to the defendant was correctly admitted. The certificate of the town-clerk of his having recorded a deed, is only *prima facie* evidence of the fact. It is not made evidence by any statute ; and if the recording is not full and correct, that may be shown notwithstanding this certificate. The Court must be convinced that the deed has been recorded, before they admit it to be read to the jury ; and it is very convenient and proper for these certificates to be treated as *prima facie* evidence of the fact, when all appears regular. What is lacking of this regular appearance must be supplied in some way. The certificate, that the deed was received by the town-clerk for record, was regularly made and signed by him. And no person can read that part of the certificate, which is not signed, without knowing it to be in the same hand writing with that certificate, which is signed. The Court did right in considering this want of the signing at the bottom of the whole, a mere slip, and the certificates, with one signing, sufficient *prima facie* evidence of the recording. Or the defendant might have got the clerk, if living, to add his signature, and thus cured the defect. This the clerk, on discovering it, if he knew it to be a mere omission, should make correct forthwith, by signing his name as clerk, having it operate as *nunc pro tunc*. When all the substance is as it should be, the evidence, that it is so, should be perfected as soon as possible.

We will now examine the instructions given to the jury, to which exception was taken. It appears by the exceptions, that, when the plaintiff's intestate, who was mortgagor of the land, on which this timber grew, had neglected payment after the money became due, the mortgagee had conveyed to the defendant, and promised that said mortgagor should leave possession by the first of May, 1830 ; and that the said intestate, being told of this, assented to it, and promised to quit the possession by said first of May ; that all this took place before the cutting of the timber in question, which was cut in the winter and spring of 1830 ; that said intestate left the premises, and the defendant took the possession of the same, before the conversion complained of. Upon this state of facts, the said intestate was a wrong doer in cutting the timber ; and he could gain no title to it, against the defendant, who was then owner as mortgagee, with a right to possession, by such

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wrongful cutting. The said intestate's right to possess our statute, had ceased with the arrival of pay day ment. His possession, when he cut this timber, was anancy at will ; and, as the defendant had obtained a the mortgagee's title, his said possession was as tenant defendant. And, whether his right of redemption or not, would make no difference in this respect. That of the parties must be decided at law ; and it would be remarkable, if the law would admit the tenant at will to cut trees of his landlord, and then recover in trover of his using those trees. Upon such a doctrine the plaintiff seems to be founded. And there is no reason to suppose a mistake in this ; for the intestate acknowledged this defendant, when he purchased other timber of him on his land. Upon the whole, the timber sued for did belong to the defendant ; and the charge of the county court was correct.

There has been presented, also, a petition for a writ of habeas corpus in this same case on the ground of newly discovered evidence. It may be sufficiently disposed of by saying, that the evidence offered can have no possible bearing upon the case. That relates wholly to rails, which the intestate carried for Cutler, and the time of his carrying them. This has nothing to do with the timber left on the farm by the intestate, which was sold by the defendant. The petitioner takes nothing out of this ; and,

The judgement of the county court



### STILLMAN, WELLS & Co. vs. TRUMAN BA

In an action on jail bond, the defendant pleaded *nul tiel record* of which the bond was predicated, and the plaintiffs replied that he was estopped from pleading said plea, because that, after the record was taken, the court awarded a new trial to the defendant on condition that he should remain as security for the plaintiffs might recover in the original action ; that the court adhered to said rule, and a new trial was had, in which the plaintiffs recovered a judgment for a less sum than at the former trial. The defendant rejoined and satisfied the judgment last recovered, and prayed judgment that he should be estopped from pleading *nul tiel record* of the judgment first recovered. He held on special demurrer to this rejoinder, that there was no estoppel. He concluded by praying judgment whether defendant ought not to be estopped. That the replication, pleading the rule of court as an estoppel to the plea of *nul tiel record*, was sufficient.

Where a new trial was granted in an action under a rule, that a judgment should remain as security for the plaintiffs might recover in the original action, and a new trial was had, in which the plaintiffs recovered a judgment for a less sum than at the former trial, which the defendant afterwards paid,—it was held that such payment did not bar a recovery in an action on the bond.

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This was an action of debt on a jail bond, in common form, counting upon a judgement in favor of the plaintiffs against the defendant, rendered by Chittenden county court, at their March term, 1826, for \$136 damages, and \$26,24 costs ; and setting forth the issuing of execution on the same on the 12th of April, 1826, the commitment of the defendant to jail, the execution of the bond on the 9th of June, 1826, and a subsequent escape. The writ was dated February 28, 1827, and served the 14th of March, following. The defendant pleaded in bar,] "that there was not any record of the supposed recovery in the said declaration mentioned." &c.

To this plea, the plaintiffs replied as follows :

"And the plaintiffs, as to the plea by the defendant first above pleaded, by special leave of the court for that purpose first had and obtained, say, that, the said defendant ought not to be admitted to say and allege that there is no such record as in said declaration mentioned, because they say, that at the term of the county court holden at Burlington, within and for the county of Chittenden, at the time in that behalf in plaintiff's declaration set forth, the plaintiffs did, by the consideration and judgement of the said court, recover such judgement as is in that behalf in plaintiffs' declaration above alleged ; and afterwards, to wit, at the term of the county court, holden at Burlington, within and for the county of Chittenden, on the last Tuesday of March, 1828, upon motion of defendant, by him, at a previous term of the same court, filed in due form of law, a new trial in the plaintiffs said original action was, by the consideration and judgement of the said court, granted to the defendant ; and the said court then and there, at the time of granting the said new trial, as aforesaid, did, by rule of court, duly entered of record, order that the said new trial should be granted to the said defendant, on his the defendant's entering into a rule of record, that the said bond in plaintiffs' declaration mentioned, and the suit thereon, should remain as security to the plaintiffs for any final judgement the said plaintiffs might recover in their said original action ; and the said defendant voluntarily submitted, and entered into the said rule. And the said new trial having been granted to the defendant as aforesaid, such proceedings were thereupon had in the said original action, that the plaintiffs afterwards, to wit, at the term of the county court holden at Burlington, in the county of Chittenden, by adjournment, on the fourth Monday, being the 22d day of June, 1829, by the consideration and judgement of said court, recovered judgement against the defendant in their said original action, for the sum of seventy-seven dollars and twenty-one cents, which was then and there by the said court adjudged to the plaintiffs for their damages, which they had sustained as well by reason of the nonperformance by

a promises and undertakings by the defendant to the plaintiffs, and set forth in plaintiffs' said heir cost and charges by them in and about n that behalf expended, whereof the said d; all which by the record and proceedings, e said county court, fully appears, and the verify the same by the said record, when,anner, as the court here shall direct and that the said record may be inspected and here, and judgement whether the said de- e estopped from pleading the said plea by

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him above pleaded."

The defendant rejoined, as follows :

"And the said *Truman Barney* rejoins and says, that for any thing in said replication contained, he ought not to be estopped from pleading his said plea and denying the said record, as in his said plea he has done, because he says, that though true it is, that the plaintiffs, by the consideration of the said county court, on the said fourth Monday of June, 1829, did recover a judgement in their favor against the said *Truman*, as they have set forth, yet that the plaintiffs have received satisfaction for said judgement; and that this defendant, on the first day of August, 1829, paid to them the full amount of the said judgement: and this he is ready to verify. Wherefore, he prays judgement if he ought to be estopped from denying the said record, and that he have his cost."

The plaintiffs demurred, specially assigning as causes of demurrer the following :

1. "Because in pretending to plead payment of the judgement in plaintiffs' declaration mentioned, defendant begins and concludes his rejoinder by insisting that he ought not to be estopped from pleading *nul tiel record*. 2. Because, defendant attempts to support a plea of *nul tiel record*, by alleging a fact which admits the existence and validity of the record or judgement."

The cause was argued by *Bailey and Marsh*, for plaintiffs, and by *Adams*, for defendant.

**PHELPS, J.**—Two causes of demurrer are specially assigned in this case; one relating to the form of the plea, and the other consisting in a supposed departure of the rejoinder from the plea. As to the former, it is to be observed, that the plaintiffs' replication impliedly admits the truth of the defendant's plea, but attempts to avoid it, by urging the rule of court set forth in the replication, as matter of estoppel. There seems to be no impropriety, therefore, in concluding by praying judgement, whether the defendant

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ought not to be estopped, &c., inasmuch as the term estopped is to be understood as synonymous with the expression, barred, or precluded, in a plea ; and, if the conclusion is proper in the pleading on one side, it is undoubtedly so on the other. With respect to the supposed departure in the defendant's pleading, it is sufficient to remark, that the rejoinder refers, not to the judgement set forth in the declaration, but to that specified in the replication ; and there is evidently no departure or inconsistency in pleading *nul tiel record* to the one, and payment or satisfaction to the other.

The important question in the case, however, is as to the sufficiency of the replication and rejoinder, in point of substance ; and this depends upon the construction and effect, which may be given to the rule of court upon which the plaintiffs rely.

The obvious purpose of that rule was, to give the plaintiffs a valid and available security for whatever might be ultimately recovered. Without such a rule, the vacating the original judgement would have necessarily annulled the bond. The plea of *nul tiel record* would have been a good defence to the action. To exclude this defence, the only thing to be guarded against, was the rule entered. It is obvious that this rule could not, and did not, vary the nature or terms of the bond ; and that it could operate effectually, in no other way, than by estopping the defendant from pleading this defence. If it has not this operation, it is utterly nugatory. It is however contended, that the proper mode of enforcing the rule was to refuse to receive the plea, and that it was not proper to plead the rule as an estoppel. It is undoubtedly true, that the court might have treated the plea as a nullity, and rendered judgement as for want of a plea. But it by no means follows, that the rule might not be pleaded as an estoppel. Any matter of record, which concludes the party, may be so pleaded. This is not only proper, but, had the rule been entered in any other court than that in which this action was tried, it would have been the only mode in which it could be enforced. It certainly is not competent for the defendant to object, that his plea ought not to have been received ; and there is moreover an absurdity in contending that a plea, which, for any reasons ought to be treated as a nullity, should, when those reasons appear of record, be adjudged good upon demurrer.

If then the replication is sufficient, the next inquiry is as to the rejoinder.

This sets forth, simply, a satisfaction of judgement ultimately recovered in the original suit ; and it is insisted, that such satisfac-

tion vacates the rule. But it is to be borne in mind, that the rule CHITTENDEN  
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1832. was entered into on the occasion, and as a condition, of granting the new trial; and so long as the defendant has the benefit of the order vacating the first judgement, so long are the plaintiffs entitled to the benefit of the rule. In truth, they are neither of them vacated; nor can they be, except by a court having competent jurisdiction. They may be satisfied, but must forever remain in force, in the same manner, that a judgement satisfied is in force for the mutual security of the parties. The consequence is, that, as the plaintiffs could never prosecute their original judgement, which was vacated, so, on the other hand, they are forever protected by the rule in question. At all events, if that rule was intended to shut out this defence, it is idle and nugatory, unless it so operate until a final decision in the suit. Stillman et al.  
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Another view may be taken of this subject. Laying out of consideration the chancery powers of the court, the plaintiffs were certainly entitled, in strictness of law, at the commencement of this action, to a judgement for the penalty of this bond. They were so entitled until the new trial was granted; and if the intent and effect of the rule be, as we suppose, to save that right of action, it was saved as a right to recover the penalty. The Court might (and such we believe would have been the proper course) have rendered judgement on the bond, and directed the judgement to stand as a security. If that had been done, it is obvious that no other rule of damages than the penal sum could then have been adopted. As this was not done, but the right of action saved, with a view to secure a claim which was the object of future adjudication, it is clear that the right could have been nothing less than a right to the penalty. If this be so, then payment of the less sum finally recovered in the original suit, is no satisfaction of the bond, but the defendant is driven for relief to the equitable powers of the court.

Considering the rule in question, without reference to its technical operation, but with a view to the obvious and admitted intention and understanding of the parties, we must regard the bond in suit as having been made a collateral security for the original demand: and we take the law to be, in such cases, that the party may prosecute both suits to judgement, and, although he is entitled to but one satisfaction for his debt or damages, he is, unless restricted by statute, entitled to the costs of each.

The result to which we have been led is most obviously just. It certainly never was the intention of the court, nor could it have

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 Stillman et al. furnished with a security, which should thus recoil upon them-  
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 ginal action, it was in the power of the defendant to satisfy that  
 judgement, without the concurrence of the plaintiffs : and if the  
 course taken by him be sanctioned, the plaintiffs are entrapped by  
 a proceeding intended for their security. This certainly was not  
 the original design, and is most manifestly unjust.

The rejoinder is adjudged insufficient, and

Judgement is rendered for the plaintiffs.



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**JOHN P. RICHARDSON vs. WILLARD DAGGETT.**

Where on the sale of property belonging to a *feme covert*, a promissory note was execut-  
 ed to her and her husband, during coverture, for the purchase money,—it was held  
 that said note survived to the wife on the death of the husband, and that she, and not  
 the administrator, had the right to endorse it.

This was an action on a promissory note, executed by the de-  
 fendant, and made payable to Ellick Powell, since deceased, and  
 Mary D. Powell, his wife, and endorsed or transferred to the  
 plaintiff by the said Mary, since the death of her husband. Plea,  
*non assumpsit*, and issue joined thereon to the court by the agree-  
 ment of the parties. The plaintiff offered in evidence a contract  
 in writing between the said Ellick and Mary, executed previous  
 to their intermarriage, and dated March 10th, 1827, by which it  
 was agreed between them that the estate then belonging to the  
 said Mary, was, after marriage, to remain subject to her sole con-  
 trol. To this the defendant objected, as inoperative and void :  
 but the objection was overruled, and the writing read in evidence.  
 It was then proved that the said Mary, before her intermarriage  
 with the said Ellick, was a widow, owning a considerable real and  
 personal estate, and that the said Ellick was a widower, much in-  
 volved in debt, and destitute of property ; that, soon after their in-  
 termarriage, the said Mary disposed of her property at the west,  
 and they came to live in Burlington ; that the proceeds of this  
 property, or a part thereof, was soon after invested in the pur-  
 chase of a house and lot in the village of Burlington, called the  
 Harrington place, the title of which was vested in E. T. Englesby,  
 Esq., in trust for the said Mary ; that about the 10th day of  
 March, 1830, an arrangement was made between the said Ellick  
 and Mary, and all others concerned, by which the Harrington



place was exchanged for a house and lot, called the Mansion-house, in Burlington, owned by Isaac Warner. Whereupon Englesby, with the said Ellick and Mary, executed a deed to Warner of the Harrington place, and Warner deeded the Mansion-house to Heman Lowry to hold in trust for the said Mary; that in July, 1830, the Mansion-house was sold to the defendant, the said Lowry, with the said Ellick and Mary, joining in the deed to defendant, who made some payments to said Mary, and executed several notes and a mortgage for the balance of the purchase money, the mortgage being given to the said Mary alone. At or near the same time the defendant purchased some furniture in said Mansion-house; and the note in question was given either in part payment for the house, or in payment for the furniture. The house, land and furniture, were equally acquired by means of the said previous estate of the said Mary.

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It was further proved that the said Mary was always reputed the owner of said property, real and personal; also, that all contracts and dealings in relation to the same, were transacted in her name, with the assent and concurrence of the said Ellick, who often recognized her ownership of the property in his conversations and transactions relating to it. The said Ellick died about October, 1830.

Administration had been granted upon his estate; but his administrator had not inventoried or claimed the said notes executed by the defendant. After the death of the said Ellick the said Mary, claiming to be sole owner of the note in question, transferred and delivered the same to the plaintiff. The said Isaac Warner, being sworn as a witness in the case, testified, that upon the exchange of the Harrington place for the Mansion-house, a considerable sum, (near \$2000,) was due to him for the estimated difference in value between said pieces of property; and that for this sum he took notes signed by said Ellick, who executed the notes alone at the request of the witness, and they were secured by a mortgage on the same property, executed by said Ellick and Mary, with said Lowry—that no part of said notes had ever been paid—and that he understood the defendant purchased the property as subject to the mortgage to witness.

The defendant contended that, upon these facts, the property in said note appertained to the said Ellick exclusively, and that, upon his death, the legal ownership and right of action had become vested in his representative. But the court decided, that the legal property in said note remained in the said Mary, and that

**CHITTENDEN** the transfer to the plaintiff gave him a sufficient title to sustain the  
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The defendant filed a bill of exceptions, stating the foregoing facts, on which the case came up for the opinion of this Court.

*C. Adams, for the defendant.*—1. The marriage agreement could not control the operation of the law relative to the property of the parties. Whether this agreement could be enforced in chancery is not material to enquire. At law it was annulled by the marriage. It is settled that, by mere operation of law, the property of the wife is transferred to the husband upon the marriage. Any agreement of his to control this operation will be ineffectual. It cannot be done without the intervention of trustees. There are cases where property devised, or otherwise given, to the wife, for her separate use, has been protected in chancery. But no case can be found where a gift, or other conveyance by husband, has been held good at law.—*Reeve's Dom. Rel.* 86, 87, 89.

2. But if this marriage agreement had been binding after the marriage, it related only to the personal estate. E. Powell, therefore, had the use of the real estate during his life, and on its being turned into money, the money became his.

3. The Mansion-house was not the sole property of Mrs. P. It was bought in part with the avails of the real estate, which we contend was E. Powell's. E. Powell alone executed his notes to the amount of \$2,000. Mrs. P. is not legally responsible for these notes. They could not be collected of her.

4. Mrs. P. had no legal interest in the notes. Her interest could not be increased by the circumstance that they were made payable to her and her husband. If they had been made payable to her alone, they could not have been sued in her name alone.

5. But the legal interest was in E. Powell, and subject to his sole control.—*Barlow vs. Bishop*, 1 East, 432; *Arnold vs. Revoult*, 1 Brod. and Bing. 444; *Ankerstine vs. Clark*, 4 Term Rep. 616; *Brown vs. Lane*, 2 Mod. 217; *Bayl. Bills*, 35; *Co. Lit.* 112, a.; *Com. Dig.* 78; *Martin vs. Connor*, 1 Sw. 516; *Bidford vs. Way*, 2 Bl. 1236.

6. There is a class of cases where, upon promises made to the wife for her labor and skill, &c., she being, as is said, the meritorious cause, suits have been sustained in the name of the husband and wife. But in every case it is expressly said that the suit may be brought in the name of the husband alone. By the consent of the husband she may be joined; but it is no where said she must.

*Pratt and wife vs. Taylor*, Cro. Eliz. 61; *Brashford vs. Buckingham*, Cro. J. 77; *Aleberry vs. Walby*, 1 Str. 229; *Buckley and wife vs. Collier*, 4 Mod. 156; *Same case*, 1 Salk. 114; *Philliskirk vs. Pluckwell*, 2 M. and S. 393.

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7. Mrs. P. was not joint tenant with her husband, and took nothing by survivorship. I am not aware that the *jus accrescendi* attaches to personal property. The death of Powell has not conferred any right which she had not before. She could not endorse the note. It could not be sued in her name, if he was alive. He could sue it in his name. She could not be joined in the suit without his consent,—*Reeve's Dom. Rel.* 60, 117, 130; *Chit. Pl.* 19, 20, 21; *Palmer vs. Trevor*, 1 Ver. 261; *Com. Cor.* 545; *Griswold vs. Penniman* 2 Con. R. 564.

8. Her right depended entirely on the will of her husband; and until some act by the husband to transfer an interest, the notes remain his sole property. This act must be subsequent to the execution of the notes. The mere execution of the notes in the names of both will not give her any interest, as it is still subject to the control of the husband. By bringing a suit in the names of both, it is said, and rightly, that the husband transfers a part of the interest.

9. In this case no act was done by the husband to transfer his legal interest to his wife.

*Richardson, for plaintiff.*—The question before the Court is whether the note survives to said Mary, and became her property, or, on his death, became the property of said Ellick's representative, the administrator? 1. It is not contended in this case but that the husband, by marriage, acquires an absolute property in the personal chattels of the wife, such as her money, carriages, cattle and household furniture. But there is a description of property, among which are *choses in action*, as bonds, notes, and mortgages, to which he has not an absolute, but an *inchoate* right—and to establish an absolute right of disposal, the husband must either change the nature of the interest, or reduce it to possession by action at law. If the contract be made for the benefit of the wife, while a *feme sole*, he cannot sue alone on such contract; the suit must be brought in their joint names; and on perfection of the action by judgement and execution during her life, the interest becomes absolutely his.

2. The right of survivorship to the wife of certain kinds of property, on the death of the husband, is admitted by all elementary writers upon the English law. It is laid down by *Chitty* in his

- **CHITTENDEN**, treatise on contracts, p. 38, that unless a joint suit in the names of husband and wife be brought on a contract made for the benefit of the wife while a *feme sole*, and reduced to possession, the husband can sue only as administrator of his wife, if he survives her; and in case she survives him, the debt still outstanding, she is entitled thereto, and his personal representative has no claim. And in his treatise on pleading, (ps. 20, 21,) it is fully laid down, that if the wife survives, she is entitled to all choses in action, to which she was entitled before coverture, and not reduced into actual possession, and even to a debt due upon a judgement recovered by husband and wife, whether obtained for a debt due to the wife whilst sole, or upon a contract made with the wife during coverture, where she is the meritorious cause of the action. And if in such cases the husband die pending the suit, it will not abate; but the death of the husband being suggested, she may proceed to judgement and execution. *Comyn* adheres to the same doctrine, when he says, "If there be a judgement for husband and wife upon a debt due to the wife, the survivor shall have it." *Hammond* in his work upon parties, p. 196, says, "Rights arising by the breach, during coverture, of simple agreements made with the wife, *dum sola*, belong jointly to the husband and wife: they remain with the survivor of the two." And again, the same author says, "So long as the thing remains in action, and no suit for its recovery has been instituted, so long it is important to maintain the wife's interest therein; since, otherwise, was the husband, under these circumstances, to die, the right would go to the personal representative, and the wife cut off from what in justice is her due." The same doctrine is also held by *Chancellor Kent*, in his commentaries, (vol. 2 p. 113, 114,) where he says, "If the husband die before he recovers the money, or alters the security, the wife will be entitled to the debts in her own right, without administering on his estate, or holding the same as assets for his debts." So much for elementary writers upon this subject—men of sound legal learning, and great reputation in courts of justice, both in England and this country.

3. But in *Johnson's Rep.* vol. 10, p. 51, and *Mass. Rep.* vol. 16, p. 480, are two cases directly in point, by which the doctrines above advanced are fully recognized and enforced, *Chief Justice Swift*, of Connecticut, to the contrary notwithstanding. In the first case, a bond was given to husband and wife jointly, for their maintenance during their joint and separate lives; and when after judgement on said bond in their favor, the husband, and, after

him, the wife, died,—it was holden that such bond was valid—that the husband and wife were properly joined—that the wife's interest in the judgement survived to her—and that her executor might bring *scire facias* on such judgement. In the second case, a note and mortgage made to husband and wife were adjudged to go to the wife, if she survived her husband, and not to the executor of the husband.

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4. It is the true policy of all civilized governments to *encourage*, rather than *retard*, matrimonial contracts. The establishment of a doctrine, that all the interests of the wife are merged and vested in the husband by marriage, would very much discourage, if not prevent, women of property from entering into such alliances.

5. It is right and just, that a *feme covert*, in the event of surviving her husband, should exclusively enjoy what her own industry had accumulated whilst sole; and also that of which she was the meritorious cause during the coverture. And where we find a chose in action, executed to the wife while sole, or to her and husband during coverture, she being the meritorious cause, if it be not reduced to his possession, the just inference is, that it was intended to operate for her benefit. And it is equally the duty of courts of law and equity to carry such intention into effect.

Lastly—By the articles of agreement between the said Ellick and Mary, previous to the marriage, and their acts in relation to her property after marriage, it will appear to the Court, that by solemn covenant, her property was to be kept distinct from said Ellick's; that the note in question, as appeared on trial, was given for her property, part real and part personal, the former of which had been conveyed and kept in trust for her according to said agreement. And we ask the Court legally and equitably to enforce the contract according to the intention of the parties.

PHELPS, J.—A single question only is raised in this case. It is whether the note in question passed, upon the decease of E. Powell, to his administrator, as being his sole property, or became, upon that event, the sole property of Mary Powell, by right of survivorship. In the former case, the endorsement by Mary Powell must be regarded as ineffectual, she having no interest in the note to be transferred, and of course the plaintiff can have no right to recover on it as her endorsee; but in the latter case, his right of recovering is not contested.

In discussing this question, it is not necessary to advert to any considerations of fraud in regard to creditors, nor to enquire what

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remedy might be successfully resorted to by the creditors of E. Powell, in case his estate should prove insolvent. The present defendant stands, not in the relation of creditor to that estate, but in that of a debtor, either to the plaintiff, or, if his position be correct, to the representative of the deceased payee. It is therefore not competent for him, to fortify his defence by any considerations, drawn from the policy of our laws in affording protection to creditors against fraudulent or collusive dispositions of property. The subject is mentioned, simply with a view of guarding against any inference from our decision, which might bear upon a question of that character. We have considered this case without reference to the rights of creditors, and simply as a question arising between the widow and the heir.

The subject of enquiry in this case, although new with us, has been much agitated elsewhere; but unfortunately, there is not in the law on this subject, that perfect symmetry, nor that coincidence of authority, which might be desired. The difficulty is probably inherent in the subject. Our law having originally vested in the husband upon marriage the personal property of the wife, and divested her during coverture of the power of contracting, it would seem that its symmetry required, that all the property of the wife, either held before marriage or acquired afterwards, should vest where the power of contracting and its consequent responsibility are placed, in the husband. With respect to real estate, however, the law has always been otherwise, giving to the husband the usufruct during coverture, and, in some instances, a life estate after; but continuing the fee in the wife to the purposes of alienation, descent and devise. And when we advert to the superior importance attached to this species of property, and the comparatively low estimation in which personal estate was held, at the period when this law was established, we perceive that the policy of the law was originally altogether more favorable to the female sex than is generally imagined. At the same time, various devices have been countenanced by the law, especially in the courts of chancery, for the securing to a feme covert a separate property. Her choses in action also are secured to her, subject however to a right in the husband to reduce them to possession during coverture. But even here, she must be joined in the action upon the ground that they survive to her if not reduced to possession during coverture. In this state of things, the law not having adopted the rule of total exclusion of the wife from an interest in property, nor admitted her full capacity to acquire and hold property, in any

manner during coverture, it becomes a matter of much difficulty to draw the line of distinction between her rights and those of her husband, or to determine the precise point where her interests cease to be regarded. It is probably owing to this circumstance, that so many subtle, not to say fanciful, distinctions have been made, and no little confusion shed upon the question, in what cases she should be joined in the action. Whether our law, or that which obtains in France on this subject, be best adapted to promote the general prosperity and happiness, is not for us to determine. But should the system of imprisonment for debt be generally abandoned, the time may not be far distant, when it will be a matter of serious consideration with legislatures, whether a full legal capacity in married women to acquire and hold property, might not mitigate the evils of many an unfortunate connexion.

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In discussing the question presented by this case, no importance can be attached to the suggestion, that a *feme covert* is not to be regarded as having a separate existence. This position is utterly untenable. With respect to her real estate, she is regarded as the legal owner. She may convey by deed, or devise by will, and no conveyance of her husband will pass her estate without her concurrence; nor at common law, can her right of dower be divested by any conveyance of his. Her choses in action remain vested in her while they remain such. She must join in the action if they are put in suit, and if the husband die pending the suit, she is entitled to them and not his executor. She may hold property as *cestui que trust*, and, as is admitted on all hands, she may in many instances join in a suit upon a contract made during coverture, and acquire an interest in the judgement which in case of the husband's decease carries with it the whole interest. It is conceded, therefore, that she may acquire an interest in a contract made during coverture which interest the law will recognize and protect. The only remaining question, is whether this is such a case.

If there be any case in which a *feme covert* can join in a suit on a contract made during coverture, it would seem to be that in which the contract is in writing, and she is named in it as a party. In accordance with this rule are all the authorities. She may join in an action on a bond to her and her husband.—See 1 *Strange*, 230; 4. *T. Rep.* 616; 1 *Wilson*, 224. So she may join in a suit for her personal labor, where there is an express promise to her. And the law is the same in all cases where there is an express promise to her.—See 1 *Chitty's Plead-*



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ings, 19, and cases there cited. The rule is also laid down by *Rolle*, *Fitzherbert*, *Brown Ab.*, *Comyn*, *Chitty*, *Selwyn*, *Bacon*, *Hammond on parties*, and *Kent*, in his *Commentaries*, and is supported by abundant authority. And the rule applies to a promissory note.—See 2 *Maule & Selwyn*, 393.

She may join also where she is the meritorious cause of the claim or right of action.—*Chitty's Pl.* 17, 18 and 19 ; 3 *Lev.* 403 ; 4 *T. R.* 616 ; 1 *Ld. Ray.* 398 ; *Cro. Eliz.* 61.

In this case Mary Powell might undoubtedly have joined with her husband in an action on the note in question, were he living. She is not only named in the note, but was unquestionably the meritorious cause of the right of action. The case states that Ellick Powell was much embarrassed, and destitute of property ; that Mary Powell was possessed of a considerable estate, which estate was exchanged for real estate in Burlington, the title to which was vested in trustees, and that the note in question originated in a sale of that property. The circumstance, that Ellick Powell executed the notes to Warner, is not important, as the property of the wife was doubtless relied upon as the means of payment.

If she might have joined her husband in a suit on the note, is it not because she has a right vested in her, which is to be enforced by that suit, and which the law will recognize ? I am aware that the husband may sue alone, and appropriate the property to himself ; but this arises from the superior control which the law gives him over the interest of the wife. He may also appropriate her choses in action appertaining to her before marriage to his use ; but if he omit to do so, they survive to her. And this power is no more inconsistent with the right of survivorship in the one case, than in the other.

The correct view of the subject seems to be this : that the wife has in such cases an interest in the contract which the law recognizes, and will enforce, subject however to be defeated by the husband, in the same manner that he may extinguish her interest in her choses, in other cases ;—that this interest remains until extinguished by him, and if he omits to do so, it survives to her. It is difficult to conceive upon what principle an action can be sustained in her name, even jointly with her husband, unless there is some preexisting right to support it.

It has been contended, that this interest in the wife originates in the circumstance of her being joined in the action, and depends upon the election of the husband ; and that no right exists in her

until the action is brought. This is certainly inverted logic. That a right is created by the mere attempt to enforce it, or that the mere incident to a right is its cause or source, is a metaphysical puzzle, in solving which we should find little aid in analogy. Were this the correct principle however, it would seem to apply in all cases where the husband chose to unite with his wife in bringing the action; yet it is only in those cases where the wife is the meritorious cause, or when there is an express promise to her, that she may be joined. The plain inference from this is, that she is joined in such cases, upon the intelligible and rational principle, that she has a right created by the contract, and in conformity to the general rule, that the action may be brought by those in whom the right is vested.

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Again, it is laid down in the books, that the wife may join where the cause of action would survive, but not where it would *not* survive. If the right survives in consequence merely of her being joined in the action, the rule is nonsensical. The rule, however, presupposes another criterion, and that there is a class of cases in which the right would survive without a suit brought. If she cannot join unless the cause of action would survive, it follows, *e converso*, that where she may join, the cause of action survives. There is no doubt that this is such a case, and, therefore, we infer that the cause of action in this instance survives.

This view of the subject preserves the analogy of the law. It is a general rule, that where the cause of action exists in two persons jointly, the cause of action, in case of the decease of one, survives, and is vested solely in the other. It is admitted, that the husband may defeat the right of the wife in a case like the present; but this is an anomaly in the law, growing out of the peculiar relation existing between them; and where this power is not exercised there appears no good reason why the usual consequences of a joint interest or right should not follow.

Again, it is settled that the wife is entitled, as survivor, to a debt due upon a judgement recovered by husband and wife, whether it be recovered for a debt due to her *dum sola*, or upon a contract made during coverture. It is difficult to perceive, how the recovery of a judgement by them jointly should have this effect, if an express contract would not carry the same consequence. That her right does not depend in such case upon the mere circumstance of obtaining a judgement, is apparent from another rule which is well settled, that if she is properly joined in any case, and the husband die pending the suit, the cause of action

**CHITTENDEN** survives. See 1 *Chitty's Pl.* p. 21 ; 2 *Bla. Rep.* 1239 ; *Cro. January, 1832.* *Jac.* 77, 205 ; *Co. Lit.* 351 ; 1 *Vernon*, 396 ; 4 *T. R.* 616 ; *Com. Dig., Baron & Feme, F. 1.*

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The same rule is laid down by *Kent*, 2 *Kent's Com.* 116 ; by *Hammond on parties* p. 198 ; in 2 *Vernon*, 683, and 2 *P. Wms.* 496.

The inference from this rule is irresistible, that the cause of action survives in all cases where the wife may be joined, unless the right of the wife is considered as originating in the act of the husband in commencing the suit. For such an idea, no precedent is found in analogous cases ; nor is there any instance of the kind known to our law, except in the single instance of a *qui tam*, or popular action, which is a creature of statute, and governed by principles having no applicability to the present case.

Another strong argument in support of the position taken by us, is derived from the fact, that, in a court of chancery, a security like the one in question has ever been considered as surviving to the wife. We know no good reason, why a different rule should obtain at law. There are indeed cases, where in consequence of the different mode of proceedings in the two courts, a different result would be produced. But this can be justified, only upon the ground that the mode of administering justice, peculiar to each, is more thoroughly adapted to the great ends of administering justice in some cases than in others. Courts of law cannot, in all cases, adopt with propriety the rules of chancery, because the forms of proceeding, and the powers appertaining to the former, do not always admit of the same effectual and salutary application and enforcement of the rule which may be had in the latter. But where no adventitious difficulty of this nature occurs, but an abstract question of right, unembarrassed by technicality or form, is presented, no good reason can be assigned for contradictory or conflicting decisions.

This question has undergone a discussion in two of the neighboring states. The case in 16 *Mass. Rep.* 480, was, in all important particulars, similar to this. Upon full discussion and deliberation, it was there held, that a note and mortgage, executed to husband and wife during coverture, survives to her. A similar decision has been made in New-York ; see 10 *John. Rep.* 51. Although these cases are not to be regarded as strictly of authority in this state, yet they are entitled to great consideration, as the opinions of two eminently respectable tribunals.

We are referred to two authorities, as sustaining the contrary

doctrine. The first is *Reeve's Domestic Relations*, p. 62, and the other is the case of *Griswold vs. Penniman*, 2 Conn. Rep. 565. The opinion of *Judge Reeve* is of great weight. Reverting him as we do, as one of the fathers of the American bar, and as an early and able commentator upon our jurisprudence, his opinions have been received with that deference, which by common consent is accorded to superior intelligence and superior worth. Infallibility, however, is not the property of the human intellect; and if there be any science, which, from its multifarious details, its refined distinctions, and the compass and variety of its application, is beyond the grasp of a single mind, it is probably the science of the law. Of the ablest jurist it may often be justly said, "*Aliquando dormitat Homerus.*"

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*Judge Reeve* lays down the doctrine contended for by the defendant, but he admits that there are respectable authorities to the contrary; that the rule has ever been otherwise in chancery, and finally, that as this subject falls generally within the cognizance and control of that court, the rule which obtains there may be considered as having prevailed.

The case of *Griswold vs. Penniman* bears no analogy to this. That was a contract respecting a distributory share of an intestate estate, which came to the wife by inheritance, and came within the common rule, that the personal property of the wife in possession vests in the husband. It was not necessary, in that case, to decide the question now presented. The opinion of *Judge Swift*, however, it must be admitted, covers that point now in controversy. He considers the circumstance that the husband may, in such case, sue alone, as decisive. But is not the fact that she may join in the action, and that in that event the cause of action would survive, equally decisive? He considers also, that the rights of the wife are dependant upon the election of the husband; and that the bringing the action in their joint names determines that election, and vests the right in her. The idea that her right originates in this circumstance, has already been considered. At the same time, it must be admitted, that her rights do in a sense depend upon his election, inasmuch as he may exclude the wife from all participation in the right of action. The question, however, is as to the consequence of his failing so to determine. We consider, in analogy to the law in regard to her choses in action, existing before marriage, that, where the law does recognize such an interest in her as warrants her being made co-plaintiff, that interest, unless extinguished by the husband, does survive. But admitting that

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the right of survivorship does, in such case, depend upon the husband's election, is there no other mode of determining that election, than simply by bringing a suit? We think there is; and that the intent of the husband may be inferred, under circumstances, from the act of taking the security in a joint form. Adopting then the principle of *Judge Swift*, is there not enough in this case, to warrant the conclusion, that our decision is in perfect consonance with the intention of the husband? Ellick Powell, as is stated in the case, was in embarrassed circumstances and destitute of property. The wife was possessed before the marriage of considerable estate. By an agreement, made between them before marriage, this estate was to be subject to her separate and sole control. This agreement, it is argued, became, by the subsequent union between the parties, extinguished. Be it so; yet there is no difficulty in considering it, as furnishing evidence of his intention, however inoperative it might be as a contract. The property was kept subject to the wife's control—the title to it, upon its re-investment, was vested in trustees—and there it remained, until, by means of a sale, with the concurrence of all parties, it became at last invested in the security in question. Can there be a doubt, under these circumstances, of the intention of E. Powell? Does not his conduct in relation to this property, from the time of his marriage, to that of his decease, indicate throughout a settled purpose to adhere to the agreement, which, whether it could be legally enforced or not, was certainly binding in conscience and common morality? Shall forced presumptions be made, or the memory of the dead reproached by the supposition, in despite of this evidence, that he entertained the purpose of violating his faith, and leaving her who had confided in it, in case she survived him, bereft of her subsistence?

It is only necessary to add, that there is no doubt, that a court of chancery would treat this note as the separate property of the wife. No reason is furnished us, nor do we believe can be, why we should deny her, on this occasion, that protection in her rights, which, in another capacity, we should be forced to award to her.

The judgement of the county court is, therefore, affirmed.

**WILLIAM EVERTS vs. JOSEPH BOSTWICK, AND OTHERS.**

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Where the condition of a bond was, that the obligors should pay and discharge a certain mortgage deed, executed by the obligee to a third person, conditioned for the payment of certain promissory notes also executed by the obligee,—it was held in an action brought by the obligee, for a breach of the condition, that it was not necessary for him to produce the notes on trial; and that the bond sufficiently described the notes, though it did not mention the time when they were payable, and described them as being signed by the obligee, when they were in fact signed by him and another person.

In such case the plaintiff may recover, though the non-payment of a note is set up as a breach of the condition, which is not mentioned in the mortgage deed—the mortgage itself not being referred to as a part of the contract, and the bond providing for the payment of the note, and declaring it to be one of the notes secured by the mortgage,

This was an action of debt on a bond with the following condition, viz :

“The condition of the above obligation is such, that if the said Joseph, Anson and Charles D. or either of them, shall well and truly pay, satisfy and discharge, a certain mortgage deed by the said William executed to Jireh Durkee, on the 27th day of December, A. D. 1824, conditioned for the payment of sundry promissory notes, executed by the said William to the said Jireh Durkee, among which the following described notes remain now due and unpaid; to wit, two notes bearing date on the said 27th day of December, 1824, one for the sum of \$300, and the other for the sum of \$238, 23, on which is endorsed, on the day of the date thereof, the sum of \$83, 68, and both notes payable to said Jireh Durkee, with annual interest from the date thereof until paid; also a certain other note on which the said William confessed judgement in favor of the said Jireh, on the 28th day of February, A. D. 1829, before John C. Thompson, Esq. justice of the peace within and for the county of Chittenden, for the sum of \$185, 90 in damages, and 25 cents costs of confession, on interest from the date of said judgement until paid; supposed to amount in the whole, with interest to the date hereof, to the sum of \$759, 41; and shall at all times hereafter indemnify, and save harmless the said William from all cost and damage he may sustain in consequence of executing said mortgage and notes, then this obligation to be void, but otherwise of force and effect.”

The condition of the mortgage referred to in the above was as follows, viz :

“Provided nevertheless, if the said William Everts, his heirs or assigns, shall well and truly pay, or cause to be paid, unto the said Jireh Durkee five certain notes in writing, bearing date the 27th day of December, A. D. 1824, for the sum of \$238, 23 each; the first payable within one year from date, the second payable within two years from date, the third payable within three years from date, the fourth payable within four years from date, and the fifth payable within five years from date, with annual inter-

CHITTENDEN, est thereon ;—and also four certain other notes executed by the said Jireh Durkee to Nathaniel Mayo, bearing date the 28th day of June, A. D. 1823, the first payable on the 28th day of May, 1825, the second on the 28th day of May, 1826, the third on the 28th day of May, 1827, and the fourth on the 28th day of May, 1828, with annual interest—these four last described notes being the notes payable to said Mayo, described in the deed of this date from said Durkee to said Everts—according to the tenor thereof, then this instrument to be void, but otherwise, to be and remain in full force and virtue.”

The plaintiff on trial before the court, offered in evidence the following note, viz :

\$300

“ *Burlington, Dec. 27, 1824.*

For value received we jointly and severally promise to pay Jireh Durkee or order three hundred dollars within five years from date with annual interest.

*Wm. Everts.*

*Benjamin Bishop.”*

Witness, Lyman Cummings.

To this the defendants objected, on the ground that it was not included in the mortgage aforesaid, nor in the condition of the bond : but the court overruled the objection, and admitted the note in evidence. The plaintiff offered to prove that Bishop signed the note as surety for Everts ; to which the defendants objected ; but the court admitted the evidence. The court rendered judgement for the plaintiff for \$ damages. The case having been reserved for the opinion of this Court,

*Bailey and Marsh, for the defendant,* contended, I. That the bond was plainly designed as a bond of indemnity against the mortgage, and the notes included in the condition of the mortgage only. The notes are described as specified in the condition, and are not mentioned in the bond except in connexion with the mortgage. The plaintiff, therefore, ought not to have recovered for the note offered in evidence, unless it appeared that it was connected and secured by the mortgage. The mortgage was the deed of the plaintiff, and conclusive on him, and he cannot be permitted to alter, restrict, or enlarge, the condition of it for his own benefit.

II. The note produced in evidence did not sufficiently appear to be the note intended in the bond. The description of the note in the bond is plain and certain, and it not appearing that there were two notes to which the description might apply, there was no latent ambiguity in the case. If the note was so insufficiently described, that it did not appear what was meant, then it was a



patent ambiguity, and, of course, parol evidence ought not to have been received to explain it. But there was in truth no ambiguity of any sort. The note is described as dated 27th Dec. 1824, and given for the sum of \$300, and executed by the plaintiff to Jireh Durkee; no time of payment is mentioned, and, of course, the law would adjudge it to be payable immediately. But the note read in evidence is payable in five years. The note described is the note of the plaintiff. The note read in evidence is the joint note of plaintiff and another. The note produced then, and the parol evidence admitted, went to contradict the instrument declared on, and were therefore inadmissible.

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*Richardson, contra.*—1. The plaintiff says he ought not to be barred from having judgement in this case; for that although the note produced in evidence, as per bill of exceptions, is joint and several, still it is the note of the plaintiff; for in law, a joint and several note may be taken to be either joint or several, and prosecuted as such against one or both signers.

2. It was agreeably to the principles of law to show, that Bishop signed the note as surety, and the decision of the court admitting the evidence was in conformity with those principles.

3. If it was fairly the intention of the parties to the bond to include this note, the court will not be very nice, in sustaining the judgement of the court below, and enforcing by a liberal construction the intention of the parties. And that such inference is legitimate, the Court have only to examine the date and amount of the note, and compare them with that described in the condition of the bond, to arrive at such conclusion.

PHELPS, J.—The exception to the decision of the court below, in admitting the note in question, as evidence in the case, is founded on a supposed variance between the note offered and that described in the condition of the bond declared upon. The question is not as to the identity of the note, as a question of fact, but whether the note offered is to be taken, by legal intendment, to be another and different note from that described in the contract.

Should it be found, that the exception is well founded in this particular, it would be well to inquire, how far the error of admitting it, as evidence, affords a ground for reversing the judgement. The expression in the contract, that the defendants "shall well and truly pay, satisfy, and discharge, a certain mortgage deed," admits of no other construction, than, that they shall pay the

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debt secured by the mortgage ; and, as the contract proceeds to describe the several notes secured by the mortgage, and to be paid by the defendants, the reference to the mortgage may be regarded as mere matter of description ; and the contract may be considered as simply a contract to pay the notes there designated. It is clear that this contract is broken, if the notes are not paid by the defendants when they become payable, and that it is not necessary, that the plaintiff should have paid them, in order to sustain his action. The contract being proved, the *onus probandi* rests with the defendants, and, if performance is relied on as a defence, the production of the notes, by them, would tend to support that defence. But it is equally clear, that, as the existence of the notes, as well as the obligation to pay them, is admitted by the bond, it is not necessary for the plaintiff to produce either notes or mortgage. The case bears no analogy to the action of ejectment on mortgage, where, for obvious reasons, it is necessary to produce the note on which the mortgage is predicated. Had the evidence therefore been rejected, the defendants would still have been under the necessity of shewing performance ; and if no evidence to that effect were offered, judgement must have passed against them. The error therefore, if error there be, is wholly immaterial. It is an instance of the exhibition of unnecessary evidence on the part of the plaintiff, and evidence in no wise prejudicial to the defendants.

If, however, we regard the decision of the court below as important, it will be found that the exception is not well founded.

The objection to the evidence was that the note was variant from that described in the condition of the bond. Upon a comparison of the two instruments, it is found, that the note is correctly described in the bond, except that the time when the note became payable is not there specified. This is an omission merely of one particular, but such an omission is not a variance. There is enough to identify the note, and when the note is produced, it answers the description. There is no discrepancy nor any difference, except that the note is not as fully described as it might have been. It is true, that, where a note does not express any time of payment, the law intends that it is payable on demand : but this inference of law is rebutted, in this case, by the production of the note. The law makes no such intendment, in a case like this, for the mere purpose of creating a variance, and defeating the intention of the parties. Nor is there any reason, in such a case, for any such intendment. The note is sufficiently identi-

fied, and may be referred to, to supply any omitted particular ; CHITTENDEN,  
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and the supplying it produces no contradiction, and no variance.  
In the case put, there is the strongest reason for making the in- Everts  
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tendment : it becomes necessary to perfect a contract, and carry  
into effect the intention of parties. But to apply such an intend-  
ment here, would be to create artificial difficulties, in the way of  
justice, for no better purpose than the mere exercise of ingenuity.

It is further objected, that the note produced is signed by W. Everts and B. Bishop, whereas the bond describes the note of W. Everts. The remarks already made are applicable here. This is another particular in which the description of the instrument is silent, but it cannot be necessary, to the purpose of this description, to include every particular. Besides, the mortgage was executed by Everts alone, and the note in question, being joint and several, is well described as executed by him, although it was signed by Bishop also ; especially as the latter signed as surety merely.

It is also urged, that this note is not described in the mortgage. This is true ; but it is to be observed, that the mortgage is not made, by the reference, a part of the contract. The condition of the bond expressly provides for the payment of the note in question ; and it becomes therefore immaterial, whether it be secured by the mortgage or not.

But if it were material, a very satisfactory answer to the objection is furnished by the bond itself. The bond not only provides for the payment of this note, but declares it to be one of the notes secured by the mortgage : the defendants are therefore estopped by the bond, from denying the fact.

**Judgement affirmed.**

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LUTHER DIXON vs. JOSEPH SINCLEAR.

Where judgement had been rendered in a suit, *that the plaintiff from having and maintaining his action should be barred, and that the defendant recover his cost,—it was held to be a judgement on the merits of the action, and a bar to any future action brought for the same cause.*

A judgement was rendered for the plaintiff by the mutual agreement of the parties, subject to the award of arbitrators upon certain claims pleaded in offset; and the arbitrators failing to make any award, the plaintiff brought an action of debt on the judgement. The defendant pleaded that the judgement had been rendered on the condition above mentioned, and that he was willing and ready to proceed with the arbitration, but that the plaintiff refused. The plaintiff replied, admitting the agreement, but denied that the defendant was ready and willing to proceed with the arbitration, and alleged that he had refused so to do, though requested. Upon this, issue was joined, and found for the defendant; and judgement was rendered accordingly. The plaintiff afterwards brought another action on the original judgement; and the defendant pleaded in bar the former judgement of the court in his favor. The plaintiff replied, setting forth the foregoing facts, and insisted that the judgement which had been rendered in the former action, was not rendered on the merits. It was held on demurrer to this replication, that the defence relied on in the former action was of a permanent character, and that the replication was insufficient in law, to obviate the legal effect of the plea.

This was an action of debt in common form, counting upon a judgement of Chittenden county court, rendered at their March term, 1826, for the sum of \$181,58.

The defendant pleaded specially, as follows :

“ And the said *Joseph Sinclear*, in court here, by his attorney, comes and defends the wrong and injury, when &c., and says, that the said *Luther Dixon*, from having and maintaining his said action against him, ought to be barred, because he says, that the said *Luther*, heretofore to wit at the county court begun and holden at Burlington, within and for the county of Chittenden, on the last Tuesday of March, one thousand eight hundred and twenty eight, commenced his action of debt, demanding one hundred eighty one dollars, and fifty eight cents, upon the same identical judgement in said declaration mentioned, and that such proceedings were had thereon, that the said county court at their term begun and holden at said Burlington, within and for the said county of Chittenden, on the last Tuesday of August, one thousand eight hundred and twenty nine, recovered judgement in said action, that the said *Luther* from having and maintaining his said action should be barred, and that the said *Joseph* recover his cost; as by the record thereof remaining with said court will appear.— And the said judgement still remains in full force and effect, not reversed, vacated, nor set aside; and this the said *Joseph* is ready to verify; wherefore the said *Joseph* prays judgement, that the said *Luther* from having and maintaining his said action may be barred, and he recover his cost.”

*By Charles Adams.”*

To this the plaintiff replied as follows :

“ And now the plaintiff saith, that he, by reason of any thing in

defendant's plea, by him above pleaded, ought not to be precluded from having and maintaining his aforesaid action thereof against the said defendant, because he saith, that, though true it is, that such judgement, as is set forth in said plea, was rendered in favor of the said defendant at the term of the county court in that behalf in said plea alleged, yet said judgement was not had or rendered upon the merits of said action, nor any plea involving the same, but was rendered upon a verdict given on an issue taken on a certain dilatory plea to the said action pleaded by the said *Joseph* in the court aforesaid, and the replication thereto, which said plea of the said *Joseph* was in the words and figures following : " And now the defendant in court here, by his attorney, comes and defends the wrong and injury, when &c., and says, that the said *Luther*, from having and maintaining his said action ought to be barred, because he says, that the said judgement, upon which the said *Luther* has declared, was rendered in an action brought by the said *Luther*, as endorsee of a note originally given by the said *Joseph* to one Daniel Clark, and by him endorsed to the said *Luther* ; and that before any endorsement of the said note, the said Daniel was indebted to the said *Joseph*, in the sum of two hundred and twenty dollars, which the said *Joseph* intended to apply, so far as to satisfy and annul the said note, and that while the said suit was pending, to wit, on the 28th day of March 1826, it was mutually agreed by and between the said *Joseph* on the one part, and the said *Luther Dixon*, and the said Daniel Clark, that a judgement should be entered in the suit, in favor of the said *Luther*, against the said *Joseph*, for the full amount of said note for damages, and the cost, and that the execution should lie until the first day of June, 1826 ; and that all the claims, matters and things, and controversies existing between the said Daniel Clark and the said *Joseph* should be submitted to the award and final determination of Thomas D. Rood, Truman Barney and Roswell Butler, and if the said Butler could not or would not attend, to William Barney, in the room of the said Roswell Butler ; and that the amount of said award, if in favour of said *Joseph*, should be endorsed upon the said judgement ; and that the said arbitrators meet at the house of E. D. Hubbell in Jerico, on the first Wednesday of May, 1826, and make and publish their award in the premises, on or before the first day of June, 1826—which said agreement was made in writing, and signed by the said *Joseph* and the said Daniel and Luther. And the said *Joseph* avers, that in pursuance of said agreement, he withdrew his pleas in said suit, and submitted a judgement to be entered against him for the amount of the said note, and the cost, which is the same judgement on which the said *Luther* has declared. And the said *Joseph* avers that more than twenty days before the said first Wednesday of May, 1826, he delivered to the said *Dixon* a specification of his said claims against the said Daniel Clark, to wit, on the tenth day

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of April, 1826, amounting to the sum of two hundred and twenty dollars, and that the same was, and still is, due and owing from the said Daniel Clark. And the said *Joseph* further avers, that the said arbitrators met on the said first Wednesday of May, 1826, when the said *Joseph* appeared before them, with his said claims and witnesses, and was ready to examine and adjust the same, and by agreement of parties the hearing of the same was adjourned from time to time until the last Monday in August, 1827, when the said arbitrators again attended, and the said *Joseph* appeared before them, with his claims and witnesses, and was ready to prove and support his said claims; but the said *Luther* and Daniel wholly neglected and refused to proceed therein, and refused to allow the said arbitrators to examine the said claims of the said *Joseph*, or to make any award thereon: by reason of which, the said *Joseph* was prevented from ascertaining the amount due to him from the said Daniel; and the said claims still remain wholly unpaid. And the said *Joseph* ever has been and still is ready to have the same examined by the said arbitrators, and take their award thereon, and to have the same set off upon the said judgement so by the said *Luther* recovered as aforesaid; all which the said *Joseph* is ready to verify. Wherefore, he prays judgement, that the said *Luther*, from having and maintaining his said judgement, may be barred, and he have his cost.

*By Charles Adams."*

Unto which said plea of the said *Joseph*, the said plaintiff filed his replication, in the words and figures following: "And now the said *Luther Dixon* in reply to the plea of the said *Joseph Sinclear*, by him above pleaded, saith that he from having and maintaining his aforesaid action against the said *Joseph Sinclear* ought not to be barred, because he says, that though true it is, that the said judgement upon which he has above declared against the said *Joseph* was rendered in an action brought on a certain promissory note endorsed by the said Daniel Clark to the said *Luther*, and signed by the said *Joseph*; and that before the rendition of final judgement in said action, the said *Joseph* pretended to have a certain claim or claims against the said Daniel, and that they were due and owing to him from the said Daniel before the time of the said endorsement of the said note, as aforesaid; and further declared his intention to plead the same as a set off to the said note; and that the said *Luther*, Daniel and *Joseph* did make such agreement in relation thereto as is set forth in the said plea of the said *Joseph*, to wit, that the said claim of the said *Joseph* against the said Daniel should be submitted to the award and determination of Thomas D. Rood, Truman Barney and Roswell Butler, and in place of said Butler, in case he did not act as such arbitrator, William Barney; yet the said *Luther* saith that the said *Joseph* did not at the time mentioned in his said plea, nor at any time before the commencement of this suit, deliver to the said *Luther* and Daniel a specification of his said claims against the



said Daniel, nor was, or hath he, the said *Joseph*, ever been ready and willing to proceed with the said arbitration, nor to have the same submitted, heard and determined, agreeably to the terms of the said agreement, before the commencement of this action ; but on the contrary thereof, the said *Joseph* did, and hath ever refused and neglected so to do, to wit, from the rendition of said judgement against him, the said *Joseph*, as aforesaid, to the time of suing out this writ ; though the said *Joseph* was often requested to proceed with and submit the said claim agreeably to the agreement above mentioned, and though the said *Luther* and Daniel were ever ready and willing so to do. And this the said *Luther* prays may be inquired of by the country.

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And the said *Joseph* thereupon joined the issue tendered by the said replication ; and a jury being empannelled and sworn to try the said issue, the same was committed to them, and the said jury returned their verdict into court, that the plaintiff ought to be barred ; and the said verdict being accepted by the said county court, judgement was thereon rendered, that the plaintiff should be barred from having or maintaining his aforesaid action thereof against the said *Joseph*, and that the said *Joseph* should recover his costs ; which is the same judgement set forth by the defendant in his said plea to the plaintiff's present action. All which, by the record of said court, yet with said court remaining, will more fully and at large appear. And the said *Luther* avers, that after the rendition of said judgement, and before the commencement of this action, to wit, on the ninth day of March, A. D. 1830, at Essex, in said county, they, the said *Luther* and the said Clark, did propose and offer to the said *Joseph* to submit the said *Joseph's* claims against, and controversies with, the said Clark, according to the said agreement in defendant's plea mentioned, to the award and determination of the said arbitrators mentioned in defendant's said plea ; and then and there requested the said *Joseph* to appoint a time and place when and where he would attend to the submitting of the said claims and controvercies to the said arbitrators named in the said plea, according to the agreement in said plea set forth, or to suffer the said *Dixon* and Clark to appoint a time and place for that purpose ; but the said *Joseph*, then and there, wholly refused and neglected, and ever since hath and still doth neglect and refuse, to appoint any time and place for submitting the said matters to the said arbitrators, or to suffer the said *Dixon* and Clark so to do. And said *Dixon* avers, that he and the said Clark, at the time of making the said offer and proposal to the said *Joseph*, were, and ever since the rendition of the judgement by defendant above pleaded, have been ready and willing to submit the said matters to the said arbitrators according to the true intent and meaning of the said agreement, if the said *Joseph* would consent thereto. All which the said *Luther* is ready to



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The defendant demurred, and plaintiff joined in demurrer.

After argument by *Bailey & Marsh*, for plaintiff, and *Adams*, for defendant,

The opinion of the Court was delivered by

PHELPS, J.—This case comes before us on demurrer, and upon a state of pleadings somewhat complicated, especially as the replication contains a recital of the pleadings in a former action between these parties. As the demurrer was intended to draw in question the effect of all the proceedings in the former suit, as well as in this, it may conduce to a more correct understanding of the questions raised by the pleadings, to arrange the case in the order of time in which the various questions arose.

The plaintiff, it appears, recovered a judgement against the defendant, at the March term of Chittenden county court, A.D. 1826, for the sum in all of \$181,56. But it further appears, that this judgement was entered by mutual consent, and subject to the award of arbitrators, upon certain claims pleaded in offset by the defendant. The arbitrators failed to make any award in the matter, and without any such award, the plaintiff, at the March term of said court, A. D. 1828, brought his action of debt on said judgement. The defendant defended the action, and pleaded, in substance, that the judgement was rendered upon the condition above stated, and that he was ready and willing to proceed with the arbitration, but that the plaintiff refused to proceed with it. The plaintiff replied, admitting the agreement, but denying that the defendant was ready or willing to proceed with the arbitration, and alleged that he refused to do so, although requested. Upon this, issue was joined, and found for the defendant, and judgement was rendered accordingly.

Subsequently to this, viz. at the March term of said court, A. D. 1830, this suit was brought by the plaintiff, being a second action of debt upon the same judgement. The defendant now pleads in bar the judgement in the former action ; and the plaintiff, in avoidance of that plea, replies, setting forth the pleadings in that suit, as shewing the grounds on which that decision was had, and avers an offer on his part to the defendant to submit the subject of the set off to the arbitrators named, and a refusal on the part of

the defendant so to do. To this replication, the defendant demurs, and, upon these pleadings, the question arises as to the sufficiency of the plea, in the first place, and secondly, as to the sufficiency of the replication.

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The objection to the plea, in the present instance, is, that it does not, on the face of it, show a judgement which is to be regarded as a judgement on the merits of the claim, and, of course, a bar to the present action.

The plea states, the bringing of the previous suit by the plaintiff, for the same cause of action, and that "such proceedings were had, that said court rendered judgement, that the said *Luther* from having and maintaining his suit ought to be barred, and that the said *Joseph* recover his costs."

It is contended, that a judgement in these terms is not a bar to a future proceeding, for the same cause of action—that the term "bar" or "barred" is not a technical word, except as a generic term designating a certain kind of pleas—that it is not adopted, in the precedents of pleading, nor is it the appropriate language of a record. It is admitted, however, that this is the usual form in our courts of entering a judgement for the defendant, upon a plea in bar. If this admission be correct, it becomes a very serious enquiry, whether it be or be not a proper mode of entering judgement in such case, and whether, through the unskilfulness or inaccuracy of the ministers of justice, the proceedings of our courts of justice, for a period which may, and probably does, extend to the very organization of those courts, are to be regarded as having lost their appropriate decisive and conclusive character. Very strong reasons certainly are required to justify a decision, which proceeding upon technical or formal grounds merely, would serve to break the seals, which, through immense labour and expense, have been placed upon a formidable mass of litigation.

In designating the appropriate language for a record of judicial proceedings, we know of no better rule, than that it should be expressed in clear, intelligible, and definite language. These qualities may be derived from the common acceptance of words in common parlance, or from a precise technical import affixed to them as terms of art. The term *bar* or *barred*, whether we consider it as a mere technical term or not, has, when used in its legal sense, a meaning, not only comprehensive and definite, but one which with professional men, as well as elsewhere, is distinctly apprehended. It implies an insuperable obstacle—an answer to a claim, satisfactory and conclusive. The use of the

**CHITTENDEN** term bar, as designating pleas to the merits of the action, renders it peculiarly proper as expressing the decision of a court, had upon the merits, and intended as a final determination of the controversy. Its introduction, under these circumstances, gives a meaning to the language of a decision, which it might not otherwise have. It is used with reference to its settled technical import, and as excluding the supposition of any evasion of the merits of the controversy.

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It is said that the established form of such a judgement, as given in the books of precedents, is, "That the plaintiff take nothing by his bill." This is indeed the usual form in many courts. But this phraseology, aside of any artificial import attached to it in consequence of its use in this particular, is not inconsistent, with the supposition of an abatement, nonsuit, or demurrer. It does not, *ex vi termini*, negative either; whereas, the term barred, taken in its settled and well known signification, negatives all. If, therefore, a distinction be taken between the two modes of expression, the one adopted in our courts is the most significant and the least equivocal.

It is further remarkable, that the ingenious counsel, who disapproved its use, being unable to discover in it any improper or equivocal import, are driven to condemn it as unmeaning and insensible, and this for no better reason, than that some elementary writers have substituted for it phrasology less explicit and unequivocal.

It is further objected, that the plea does not shew, that the parties were by the judgement put out of court. If we are right in supposing that the plea sets forth a judgement on the merits, there is no ground for this objection. The plea further states, that judgement was also, that defendant recover his costs. This part of the judgement negatives the supposition that there were other issues to be disposed of. A judgement that the plaintiff is barred, and that defendant recover his costs, seems to dispose of the case, and the parties are necessarily out of court. We are therefore of opinion, that the defendant's plea is sufficient.

The next subject of enquiry is, the sufficiency of the replication. This professes to set forth the pleadings in the former case, with the view of shewing, that the defence there urged was not a permanent bar, but of a temporary nature; and proceeds to aver a readiness, on the part of the plaintiff, to proceed with the arbitration as a reason, why the defence relied upon on the former occasion is no longer available.

It may be remarked here, that it is the effect of the former judgement, and not its correctness, which we are called upon to consider. Whether an agreement, like that set forth in the plea to that action, relating to matters not necessarily involved in the plaintiff's action, contemplating an endorsement on the judgement, and not a modification of it by the act of the Court, and not entered of record, but resting in *pais* between the parties, is to be considered as affecting the absolute character of the original judgement, is a question then acted upon, and which is not now open for discussion. But the question now is, whether the defence then relied on is to be considered as temporary in its character, and whether the replication shews any thing to have occurred since to remove that defence. That there may be a temporary bar seems to follow from the doctrine laid down in some of the books, that some defences, which are temporary in their character, as that the plaintiff is an alien enemy, may be pleaded in bar. Why a plea, which goes merely to the temporary disability of the plaintiff, should have been regarded as a proper plea in bar, is not easy to be explained. It is sufficient that it is so, and the necessary inference is, that the defence can be made no longer than the disability exists. Where such a defence is relied on, it is most obvious, that the defence must appear to exist at the time it is pleaded. The *onus probandi* is undoubtedly on the defendant to show its continuance; but if judgement is rendered for the defendant, and the plaintiff brings a new action for the same cause, it is evident that the judgement changes the burden of proof, and the plaintiff must rebut the effect of the judgement, by shewing the bar to have been removed.

Admitting the defence to this claim to have been a temporary bar, the question arises, has it been removed?

There are two points of view, in which the agreement, connected with the original judgement in this case, may be regarded. The one is as a condition or qualification of that judgement, as in the case of a judgement, with a reference to arbitrators to ascertain damages. In this case, the judgement is not perfected nor complete, until their report is received and judgement perfected accordingly. If this is to be considered as that case, it follows, that the judgement is not to be enforced by action of debt in any court. It remains as *lis pendens* in the court where the proceeding is had, subject to the control of that court alone; and the remedy for the plaintiff, in case the hearing before arbitrators is prevented, is to apply to that court to vacate both the judgement and the

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reference, and proceed with his action. It is evident, that the proceeding, in such case, is not at an end ; that no other court can have jurisdiction, and that debt cannot of course be brought on the proceedings. In this point of view, it is apparent, that nothing short of perfecting the judgement would avail the plaintiff. The mere readiness to proceed with the hearing before arbitrators is not sufficient. The replication, therefore, upon this supposition is insufficient.

The other point of view in which the case may be regarded is this. The original judgement may be supposed to be absolute in its terms, having no allusion to the subject of the arbitration, and the agreement between the parties to be a mere matter *in pais*, made with reference to a satisfaction of the judgement. In this point of view, it might be questionable, whether the agreement would operate to bar the plaintiff's remedy on his judgement, any farther than it might suspend that remedy until the time limited for the arbitrators to make their award had expired. Were that question now open for discussion, it might perhaps be urged, that the breach of that agreement would not affect the validity of the judgement ; but that when the time limited had expired, the plaintiff might have execution of his judgement, and the defendant would be driven to his remedy for the breach of the agreement. In accordance with this doctrine, it might be further urged, that the agreement created a mere temporary bar, existing so long, and no longer, than the agreement continued in force. Certain it is however, that the willingness or readiness of either party, to perform the agreement after that time, could not affect the validity of the judgement. Adopting, for the sake of argument, this view of the subject, and treating the agreement as a temporary bar, we are still forced to consider the bar as removed, when the agreement expired. That agreement expired on the first day of June, A. D. 1826, the time limited for the arbitrators to make their award. At that period, their power ceased, and the submission was at an end. Subsequent to this, to wit, at March term, 1828, the plaintiff brought the second action, and at August term, 1829, the judgement was rendered which is relied upon by the defendant as a defence in this suit. That judgement was, at all events, conclusive of the controversy as it then stood : it still remains in full force, and with all its incidents. It is not competent for us to revise or reverse it ; nor can we avoid its conclusive effect upon the plaintiff's claim. If the plaintiff's argument be correct, the former judgement was wrong ; but if so, it cannot now be remedied.

Nor is the case altered by the subsequent offer, on the part of the plaintiff, to submit anew the matters in controversy, agreeably to the former agreement. That agreement was at an end, and, as is to be inferred from the pleadings, by the plaintiff's own act; and no subsequent proffer of his could revive it, or affect either of the former judgements. That being the case, the replication shows nothing material to have occurred, since the rendition of the former judgement; and the result is, that the replication is insufficient, and

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Judgement must be for the defendant.

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A plaintiff will in no case be compelled, for the insufficiency of his evidence, to become nonsuited on trial.

In an action for malicious prosecution, the question of probable cause is sometimes wholly a question of law, but more frequently a mixed question of law and fact.

To constitute probable cause in such a case, the facts and circumstances, on which the defendant proceeded, must have afforded him a reasonable ground to believe the plaintiff guilty of the offence charged. And statements made to the defendant by third persons, if they have an important bearing on the question of guilt, and appear to be entitled to credit, are to be reckoned among such facts and circumstances.

It is a sufficient cause for granting a new trial, that one of the jurors, previous to the trial, had formed and expressed an opinion on the merits of the cause, in favor of the party who succeeded.

This was trespass on the case for a malicious prosecution. By the report of the trial, which was had before the Supreme Court, at their June term for this county, in A. D. 1825, the case, so far as there is occasion to state it, appeared to be in substance as follows:—In A. D. 1816, the defendant, *James Smith, jr.*, taught a school in the neighborhood of the plaintiff's father, at which the plaintiff attended as a scholar. Said defendant owned a yellow boxwood scale, of the description called *Gunter's scale*, which he kept in the school house for purposes of instruction. An unfriendly feeling existed between the defendants and the family of Mr. French, the plaintiff's father, which soon excited a spirit of hostility against the teacher and his school. In this spirit the plaintiff participated. While the difficulty continued, the school house was secretly entered in the night time, and various acts of mischief were committed upon the house and furniture, with the apparent intention of breaking up the school: from which time the scale disappeared.

\*See note to the case of *Giddings vs. Munson*, ante p. 308.

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About four years afterwards two or three persons informed the defendants, that they had seen the plaintiff in possession of a scale very nearly resembling this, and one of them intimated his belief that it was the same. And it being known that the party who committed the mischief at the school house, as aforesaid, included some of Mr. French's family, the defendants thereupon preferred a complaint against the plaintiff, in consequence of which he was arrested on a charge of having stolen said scale. Being brought to trial before a justice of the peace, he proved that he had honestly purchased the scale which had been seen in his possession, and which was of a different colour from the one alleged to have been stolen ; and produced evidence tending to prove the destruction of the yellow scale, as part of the mischief committed in the school house. He was therefore acquitted. In the trial of this action it further appeared, that at the time of the plaintiff's arrest, and before he was brought to trial, the defendant, *James Smith, jr.* saw and examined the brown scale in the plaintiff's possession, and that the other defendant also saw it in the course of that trial. But this showing was accompanied by evidence, that on such examination of the brown scale, a person present pointed out certain obscure ink-spots upon it corresponding with those said to have been on the one lost, and suggested his suspicions that it had been stained.

The plaintiff having adduced evidence tending to show express malice in the defendants, and having rested his case, the defendants moved for a nonsuit, on the ground that the plaintiff had failed to show a want of probable cause for the prosecution. This motion was overruled by the court, and the trial proceeded.

In the course of their charge to the jury, the court advanced the following proposition, to which the defendants excepted :—  
“ That every man who prosecutes on the strength of the story of another, which, if true, would furnish probable cause, runs the hazard of the story proving false or unfounded ; for it is not law, that falsehood and error can be moulded into a justification through the intervention of another.” The jury returned a verdict for the plaintiff.

The defendants moved for a new trial, because one of the jurors had, at a previous term of the court, formed and expressed an opinion on the merits of the cause, which was in accordance with the verdict. This motion was supported by the affidavits of two witnesses, swearing to declarations of the juror expressive of a strong opinion in favor of the plaintiff, and by the affidavits of



the defendants, showing their ignorance of the fact until after the trial. On the other side the affidavit of the juror was produced, in which he denied having formed such previous opinion, or having uttered the declarations imputed to him.

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The defendants also insisted on their right to require a nonsuit, for the cause assigned at the trial, and moved to have the verdict set aside and a nonsuit entered. Upon these motions, and the exception to the charge, the cause was now heard.

After argument, the opinion of the Court was delivered to the following effect, by

ROYCE, J.—In this case two principal questions are presented : 1<sup>st</sup>. Whether the verdict should be set aside and a nonsuit entered ; and 2<sup>nd</sup>. Whether a new trial should be granted, either for a misdirection to the jury in point of law, or for the matter disclosed in relation to one of the jurors..

The motion for a nonsuit necessarily supposes the question of probable cause, in this kind of action, to be solely a question of law, for the decision of the Court. And it is so, when it depends wholly on the evidence of records, or written documents, as also when there is no conflict of evidence, nor ground of dispute as to the facts proved.—1 *Wils.* 232 ; *Bray.* 152. But in general, if the evidence relating to this question rests in parol testimony, and especially if there is such evidence on both sides, it then becomes a mixed proposition of law and fact. Whether the circumstances relied on to show the cause for prosecuting to have been probable, or not probable, are true and existed, is a matter of fact for the jury to find ; but whether, supposing them true, they amount to a probable cause, is a question of law for the Court.—1 *T. R.* 545. And in a case where there is confessedly no evidence tending to negative the existence of probable cause, the court should of course decide that the plaintiff has failed, in a point essential to his right of recovery. There is no occasion to determine, whether in this instance the want of probable cause was sufficiently shown, or whether the evidence was of a character for the court to pronounce upon, since we are of opinion, upon more general grounds, that the motion ought not to prevail.

The alleged right of the court to order a nonsuit on trial, is to be distinguished from the practice of entering up judgement, as in case of a nonsuit, which in England has its origin in the statute of 14 *Geo. 2*, c. 17, and in this state is commonly founded on the general rules or special orders of the court, as in case of ordering bail, and the like ; because, in all cases of the latter description,

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there is no doubt but the court is to act without reference to the will of the party. But a nonsuit, in its legal and appropriate sense, imports a voluntary act of the plaintiff, in withdrawing his appearance to the suit; and notwithstanding the very frequent mention, in the English books, of nonsuits said to be directed on trial, we are not satisfied, that the courts of that country have ever asserted the right of enforcing a nonsuit, while the plaintiff insisted on proceeding to a verdict.—1 *Sellon's P.* 464; 2 *Tidd's P.* 798; 2 *T. R.* 281.\* Much less do we find, what appears to have been often decided in New-York, that at common law the refusal to order a nonsuit was ever considered such a denial of right to the defendant, that a writ of error would lie to correct it. If, however, the subject were to be regarded in the light of mere practice, and as not concluded by authority, still the course contended for could not be generally beneficial, except under a system of jurisprudence which regularly admits but one trial in a cause. In this state, where the right of review is given by statute, a nonsuit should not be ordered at the first trial, as the plaintiff may be able to supply the defects in his first proofs; nor at the last, because public policy will then require that the controversy should be ended.

From that portion of the charge which has been certified to us, in connexion with the particular clause excepted to, it is evident that the instructions to the jury were directed, with much precision and perspicuity, to all the different features of the case, and that the rules of law usually applied to the action were correctly stated. And if in the end, those instructions were duly observed and followed by the jury, there is no ground to question their verdict. But as the proposition to which exception is taken may have had a decisive influence in the case, it becomes necessary to notice it. The principle advanced goes to exclude all information received from others, if it turns out to be false or unfounded, from furnishing, or aiding to furnish, probable cause for instituting a prosecution. This we cannot admit. It must be sufficient if the party has a reasonable ground of belief at the time of acting. In a previous part of the charge, the court had defined probable cause to be "an honest belief, founded on the existence of such facts as will warrant an unprejudiced mind in the conclusion, that the person accused is guilty of the crime with which he is charged." And in order to reconcile this definition with the subsequent doctrine, it is necessary to hold, that statements made to the prosecutor, with whatever appearance of sincerity and truth,

\*See to the same effect 6 *Pick.* 118; 3 *Greenl.* 97.—*Reporter.*

are not to be reckoned among the facts on which his belief may be formed. But this would be to exclude the common and principal foundation of belief, and to require little less than absolute knowledge.

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The position on which I have commented may be thought to derive support from the case of *Hewlett vs. Crutchley*, 5 Taunt. 277. It was there decided, that the opinion of counsel, to whom the prosecutor had submitted a statement of the transaction, and who advised the prosecution, did not furnish a probable cause. But the case discloses the most conclusive evidence of express malice, and shows the prosecutor to have been all the time conscious that the plaintiff was perfectly innocent. The court moreover place much stress upon the fact, that the case laid before the counsel was false or overstated. In connexion, however, with this case, it is proper to notice that of *Snow vs. Allen*, 1 Stark. C. 502. That was case for maliciously suing out execution and arresting the plaintiff, after his bail had been taken in execution for the same debt. Previous to the arrest, the defendant's attorney was cautioned not to proceed; but relying on *Higgins'* case, Cro. J. 320, and the opinion of a special pleader, he persisted in his course, and the plaintiff was committed to prison. *Ld. Ellenborough*, says,—“How can it be contended here, that the defendant acted *maliciously*? he acted *ignorantly*.” Again he says,—“He was acting under what he thought was good advice, and unless you can show that he was actuated by some purposed malice, the plaintiff cannot recover.”

The doctrine of the charge would be less objectionable, if limited to those cases where express malice in the prosecutor is clearly proved; and perhaps it was advanced in this instance with intended reference to such cases alone. But even this would require a distinction which seems not to have been hitherto recognized. For it is laid down in *Johnston vs. Sutton*, 1 T. R. 545, a case which was much considered, that—“a man, from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this kind of action.”

✓ It is settled in this Court, that the matter alleged in relation to the juror, if established by due proof, is a sufficient cause for granting a new trial.—*Deming and Wel'man vs. S. and E. Hurlburt*, 2 Chip. 45; *Brownell and Danforth vs. Reynolds*, decided in Bennington county on the present circuit. And notwithstanding the denial of the juror, we think the allegation is supported by

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the affidavits. He must be supposed to have misreclected, of which there is the greater probability, since he admits having held conversations respecting the suit. —On this ground, therefore, and for a misdirection to the jury, a

New trial is granted.

*Hutchinson & Hubbard*, for plaintiff.

*C. Marsh*, for defendants.

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M having contracted to perform a job of work by a specified time, for which he was to receive payment therefor when the job was done, applied to D, and stated to him the terms of the contract, and requested him, D, to furnish him from time to time with goods out of D's store, saying he wished D to wait for his pay until he had finished the job, and had received payment therefor. D assented, and let M have goods, from time to time, to a considerable amount. It was held that D was entitled to his pay for the goods so delivered as soon as the time had expired within which the job was to have been performed, though M had not completed it, nor received payment therefor.

This was an action on *book account*, and came before this Court, on the report of an auditor which had been made to the county court. It appeared from the report that the action was brought to recover for certain goods and merchandize which had been delivered from time to time to the defendant under the following circumstances :—Prior to the defendant's taking up any of the goods charged in the account, the defendant had contracted to build the whole or a part of a certain parsonage-house in Woodstock, and, by the agreement with the building-committee, was to finish the job in the fall of the same year, (i. e. 1828,) and was to receive his pay when it was done—the committee to furnish materials; that afterwards, on, or near, the last day of July, 1828, and before any goods were taken up by the defendant, the defendant told the plaintiff he had made said contract, and informed him particularly of the terms of it, as above stated; and at the same time told the plaintiff, he should want to get goods, from time to time, at plaintiff's store, and should wish plaintiff to wait for his pay until he, the defendant, completed said job, and had gotten his pay for it; to which proposition the plaintiff assented; and afterwards, from time to time, delivered to the defendant the goods charged in the account exhibited, under the agreement above stated; that the defendant entered upon the performance of his contract, and, in the fall of 1828, finished it, excepting the window blinds, for which the committee did not seasonably provide the

materials : but the defendant made and hung the blinds in May, 1829, which finished said job as defendant had contracted ; that defendant did not make a settlement with the committee respecting his contract until Nov., 1830, when he received, for the first time, some pay ; that he had not then (at the time of the audit) received all his pay, by about thirty dollars ; that the plaintiff commenced his action on the 6th day of February, 1830 ; and that he was one of the subscribers for building said parsonage house.

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Upon these facts, the auditor reported specially, that, if by the legal effect of the contract so made between the plaintiff and defendant, the plaintiff's right to demand payment for the goods accrued at the expiration of the time, ("the fall" of 1828,) within which defendant was to finish said building, there was due from defendant to plaintiff the sum of one hundred and one dollars and fifty eight cents, being the balance of the account and interest thereon. But that if the plaintiff's right to receive payment did not accrue until the defendant should have obtained his pay on said building contract, then there was nothing due on account from defendant to plaintiff.

The county court rendered judgement for the defendant, and the plaintiff reserved the case for the opinion of this Court.

After argument by *Marsh*, for the plaintiff, and *E. Hutchinson*, for the defendant,

The opinion of the Court was delivered by

BAYLIES, J.—If the plaintiff sued before his cause of action had accrued, the judgement of the county court must be affirmed. But if the plaintiff's cause of action had accrued, when he commenced his action, the judgement of the county court must be reversed, and the plaintiff recover the sum awarded. The law is well settled, that where goods, charged on book, are sold on a special contract, for the seller to wait for his pay a certain time, he cannot sustain an action on book account, until the time of credit agreed upon is past ; for until then, the seller's cause of action does not accrue. The report of the auditor states, that the defendant, before he took up the goods, "had contracted to build by job the whole, or a part, of the parsonage house, in Woodstock, and, by agreement with the building committee, was to finish the job in the fall of 1828, and was to receive his pay for the job, when it was done ; the said committee to furnish materials." And the report also states, that the defendant in the fall of 1828,

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finished said job, excepting the window blinds, for which the committee did not seasonably provide the materials: these were finished in May, 1829. If the building committee prevented the defendant performing his contract, by their negligence in finding materials for the window blinds, the defendant was entitled to his money for the job in the fall of 1828, the same as though the job had been completed.

The report also states, "that on or near the last day of July, 1828, and before any goods were by him taken, the defendant told the plaintiff, that he had made the building contract aforesaid, and informed him particularly of the terms of the same, as above stated; and thereupon, at the same time said to the plaintiff, that he should want to get goods from time to time at plaintiff's store, and should want to have plaintiff wait for his pay for the goods until the defendant should get said job done, and get his pay for it; to which proposition the plaintiff assented." It is also stated, that all the goods charged in plaintiff's account were taken up on this contract. How are we to understand this contract? Was the plaintiff to lose his goods, if the defendant did not complete his job, or receive his pay therefor, according to his contract with the building committee? The plaintiff's cause of action for the goods, which he sold and delivered to the defendant, did not depend on such a contingency; but it was the understanding that the defendant would do his job, and receive his pay, in the fall of 1828, and would then pay the plaintiff for his goods.

The plaintiff commenced his action on the 6th day of February, 1830; that is, one year and two months after the defendant was entitled to receive his money for doing the job. The report's stating "that defendant did not make a settlement of his said building contract until November, 1830," without showing any cause for this delay, is not sufficient excuse for the defendant's not paying for the goods.

There can be no doubt the plaintiff had a cause of action on the sixth of February, 1830, when he commenced his suit; and the judgement of the county court must be reversed, and judgement be rendered for the plaintiff to recover the sum reported, and his costs.

STATE TREASURER vs. JAMES KELSEY, Jr., URI BABBIT, AMOS PAUL and ABRAHAM MINOR.

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The neglect of a sheriff in not serving and returning an extent, issued by the state treasurer against a delinquent constable, is a neglect happening in the county where the treasurer resides, though it be a different county from that in which such sheriff officiates.

Though the state treasurer have a right by statute to issue an extent against a sheriff for his neglect in levying and returning an extent against a delinquent constable, he is not thereby deprived of his remedy by action at law for the same neglect ; and

If the treasurer, instead of issuing an extent against such delinquent sheriff, bring an action against him for such neglect, and recover judgement therefor, and the sheriff be committed to jail on the execution,—such sheriff's bail are liable in *scire facias* for the amount of the judgement, and cannot plead in bar thereof the delay or neglect of the treasurer to issue an extent against such sheriff.

Neither can the sheriff's bail, in such case, plead in bar that the treasurer's extent against the delinquent constable was not seasonably issued.

The act requiring that a sheriff, before entering upon the duties of his office, shall become bound, by way of recognizance, with surety, before the chief judge of the county court, or, (in case of his absence or death,) before one of the assistant judges, is constitutional and valid, though the constitution provide, that said recognizance shall be taken by the chief judge only ; and

In a case where the bond was taken by an assistant judge, parol evidence was held to be admissible to prove the absence or death of the chief judge.

This was *scire facias* in favor of the treasurer of the state against the defendants as bail of *Nathan Fuller*, late sheriff of the county of Caledonia. The declaration was as follows :—

“Whereas, the Treasurer of the State of Vermont, by the consideration of the county court begun and holden at Woodstock, within and for said county of Windsor, on the first Tuesday of June, in the year of our Lord one thousand eight hundred and thirty, recovered judgement against *Nathan Fuller*, late sheriff of said county of Caledonia, for the sum of seven hundred and six dollars and forty cents damages, and the sum of seventeen dollars and seventy one cents costs, by him about his suit in that behalf expended, as to us appears of record ; and a writ of execution for the damages and costs aforesaid, in due form of law, was granted thereon, to the said treasurer, bearing date the first day of July, A. D. 1830, directed to the sheriff of the said county of Caledonia, his deputy, or either constable of the said town of Danville, and returnable to the clerk of said county court within sixty days from the date of said writ of execution ; which writ of execution was thereafterwards, to wit, on the twenty second day of July, A. D. 1830, at said Danville, delivered by the said treasurer to Silas Houghton, who then was, and ever since hath been sheriff of the said county of Caledonia, to be executed and returned according to law ; and said Houghton, sheriff as aforesaid, at said Danville, did commit the said *Fuller* to the keeper of the jail in said Danville on the same writ of execution. Afterwards, to wit, on the 27th day of July, 1830, at said Woodstock, the said Silas Hough-



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ton, sheriff as aforesaid, on the day last aforesaid, made return of said writ of execution to the clerk of said county court, with his endorsement or return of his doings thereon, in the words and figures following, to wit,—“ *Caledonia county, ss. July 27, 1830 ;* “ By virtue of this execution, I took the body of the within named “ *Nathan Fuller*, and him committed to the keeper of the jail in “ Danville, in said county of Caledonia, within said prison, and “ left a true and attested copy of this execution, with my return “ thereon endorsed, with said jailer.

*Silas Houghton, Sheriff ;*”

as by said writ of exception now on file in said clerk's office, of record, appears. And whereas, the said judgement on which said writ of execution was issued, was rendered by said county court against the said *Nathan Fuller*, as late sheriff of said county of Caledonia, for his, the said *Fuller's* neglect and default in not serving and returning according to law, and according to the precept thereof, three extents, to wit, one against *Silas Houghton*, formerly first constable of Lyndon ; one against *Walter Wright*, formerly first constable of the town of St. Johnsbury, and the third against *Joseph Ide*, late first constable of the town of Lyndon, which towns are within the said county of Caledonia ; and the said extents against said *Walter Wright*, *Joseph Ide*, and *Silas Houghton*, were issued on the 15th day of October, 1828, and were duly, on the said 15th day of October, 1828, delivered by the said treasurer to the said *Nathan Fuller*, to be by him executed and returned, as by the record now remaining in said court, and here ready to be shown, of the said suit, against the said *Fuller*, appears. And whereas, after the said *Nathan Fuller* was appointed sheriff of the said county of Caledonia, for the year 1827, and before he entered upon the duties of said office, to wit, on the 30th day of November, 1827, the said *Nathan Fuller* as principal, and *James Kelsey, jun.* of said Danville, and *Uri Babbitt*, of said Danville, and *John Weeks* then of said Danville, now of *Haverhill* in the county of *Grafton* and state of *New-Hampshire*, *Amos Paul*, of Danville, and *Abraham Minor*, then of said Danville, now of *Albany*, in the county of *Orleans*, as sureties, personally appeared before the Hon. *William A. Palmer*, first side judge of the county court for said county of Caledonia, (the chief judge of said county court being then absent from said county,) and by a recognizance by them, then and there, entered into before said *Wm. A. Palmer*, Judge as aforesaid, and acknowledged themselves, jointly and severally, indebted to the treasurer of the said county of Caledonia, in the sum of ten thousand dollars, to be levied of their and each their goods, chattels, lands and tenements, and, for want thereof, on their bodies, if default be made in the condition annexed to the said recognizance, which was, that if the said *Nathan Fuller*, who has been duly appointed and commissioned to be sheriff of the said county of Caledonia for the year then ensuing, should faithfully discharge and perform the duties of

said office, and every part thereof, then the said recognizance was to be void and of no effect; otherwise, to be and remain in full force and virtue in law; as by the said recognizance, a true and attested copy of which is ready to be produced in court, fully appears; which said John Weeks now resides at Haverhill, in the state of New-Hampshire, and without the jurisdiction of any court within this State. And whereas, the said sum of seven hundred and twenty four dollars and eleven cents, being the amount of the damages and costs aforesaid, recovered in said suit against said *Nathan Fuller*, and also the further sum of twelve dollars and eighty seven cents, being the fees of said commitment of said *Nathan Fuller*, yet remain unpaid and unsatisfied to the said treasurer. And whereas, the said treasurer hath supplicated a proper remedy to be provided for in this behalf, and willing that justice should be done—By the authority of the State of Vermont, we command you to attach the goods chattles, or estate of *James Kelsey, jr. Uri Babbit, Amos Paul*, all of said Danville, and *Abraham Minor*, of Albany, in the county of Orleans, and them notify thereof as the law directs; and for want thereof, take the bodies of the said *Kelsey, Babbit, Paul, Weeks* and *Minor*, if to be found within your precinct, and them safely keep, so that you have them to appear before the county court to be holden at Woodstock, within and for the county of Windsor, on the first Tuesday in June next; then and there in said court to show cause, if any they have, why the said treasurer should not have execution against them, the said *James Kelsey, jr., Uri Babbit, Amos Paul, John Weeks* and *Abraham Minor*, for the said sums so demanded as aforesaid from the said *Nathan Fuller*, with the interest thereon, and cost of this suit, according to the statute in such case made and provided.”

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At the first term of the court, the defendants appeared, and pleaded in abatement the following plea:—

“And now the said defendants come when &c. and say, that the default or neglect of said *Fuller*, sheriff as aforesaid, for which judgement was obtained against him, and on which judgement this *scire facias* is founded, happened in the county of Caledonia; and this they pray may be enquired of by the record of this court remaining; and in as much as this cause is not commenced and made returnable in the county of Caledonia, where, by the law of this state, the same should be, the said defendants pray judgement, that the same be abated, and that the court take no further jurisdiction thereof, and for costs.”

The court having overruled the plea in abatement, and directed that the defendants answer over to the case, the defendants excepted to the decision, and subsequently pleaded as follows:

“And now the defendants come and defend, &c., when &c., and say, that the plaintiff ought not to have and maintain his said action against the defendants, for this, that the defendants were

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bail for *Nathan Fuller*, as sheriff of the county of Caledonia, for the year commencing on the first day of December, 1827 ; and the said constables of St. Johnsbury and Lyndon in said county, had long previous to said year 1827, to wit, as early as 1826, neglected to collect and pay over the taxes to them committed for that purpose ; and the said treasurer should, as by law he was directed, have issued his extents against them long previous to said year 1828, to wit, in the year 1827 ; yet the said treasurer without legal right, and in disregard of his duty, and more than thirty days after the next stated session of the legislature, after the said neglects and delinquency of said constables, to wit, in October, 1828, issued said extents to said sheriff, whereby the responsibility of said sheriff, in the levy, collection, return and payment, of said extents, which should have rested on the bail of said sheriff for previous years, was unlawfully made to rest on the defendants as his bail for the year 1828, aforesaid. And the said sheriff having neglected to levy, collect and return, said extents, so issued, as aforesaid, if any such neglect was by him unlawfully committed, it became and was the duty of said treasurer to issue his extent against said sheriff therefor, according to law, at some early period, at least, before thirty days had expired after the rising of the then next stated session of the legislature, in October, 1829 ; as during which time the said sheriff was good and sufficient and responsible to have answered and paid any extents, which might have issued against him for said neglects. But said treasurer, disregarding his said duty, has ever wholly neglected to issue any such extents, and after the expiration of the time wherein he by law was directed to issue the same, he unlawfully commenced a suit against said sheriff for said neglects, and neglecting to attach property thereon, the said sheriff, when the execution thereon was afterwards issued, had become, and was, wholly insolvent, and unable to respond and pay the same, to wit, on the first day of July, 1830 ; whereby, and by which neglect and unlawful doings of said treasurer, his said claim has been lost ; which the defendants are ready to verify ; and therefore pray judgement that said treasurer ought not further to maintain and have his action aforesaid against them, and for their costs."

" And for further plea in this behalf by leave of court had and obtained, the defendants say, the plaintiff from having and maintaining his said action ought to be barred, because they say, that the chief judge of Caledonia county court was not absent from said county at the time of taking said recognizance in the plaintiff's declaration mentioned, nor did the defendants, together with the said *Fuller*, enter into said recognizance before the first side judge of said county court, in manner and form as the plaintiff in his declaration hath alleged ; and this they pray may be enquired of by the court."

The plaintiff demurred to the first plea in bar, and joined issue on the other. On the trial of the issue, so formed between the parties on

the second plea in bar, the plaintiff offered, in support of the issue on his part, to prove the absence of the chief judge of Caledonia county court from the county, at the time of taking said recognizance, by parol proof; to which the defendants objected, on the ground that the same should only appear by the record of the recognizance. But the court overruled the objection, and admitted the proof; to which decision the defendants excepted; and the plaintiff having adduced the copy of the record of recognizance in support of said issue, offered the same, together with other testimony, that said Palmer was first side or assistant judge of Caledonia county court, at the time of taking said recognizance. To all which the defendants objected; but the court overruled the objection, and admitted the evidence. To this decision the defendants excepted. The court having rendered judgement also that the declaration was sufficient, and the plea in bar, by the defendants first pleaded, insufficient, and rendered judgement for the plaintiff, the defendants excepted, thereto: whereupon the cause was ordered to this Court; and it now came on to be heard on all the exceptions taken in the county court.

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*Mr. Marsh, for the plaintiff.*—The first and obvious answer to the plea of abatement is, that the statute for the collection of taxes makes it the duty of the sheriff *to collect the extents from the constables, and to make return thereof, and to pay the money into the treasury of the state.*—Stat. 403, s. 10, .11. The breach of duty alleged is, that the sheriff did not *return the extents, nor pay the money due thereon, into the treasury of the state.* The declaration against the sheriff avers, *that the treasurer resides, (and of course keeps the treasury,) in Woodstock, in the county of Windsor, where the writ was returnable.* It is almost superfluous to ask, after bringing the requisitions of the statute and the breach of duty complained of together, in what county the default or neglect of duty happened. The presumption from his making no return, and paying over no money, is, that he collected the amount of the extents of the different constables, and so performed all the duty required to have been done in the county of Caledonia, and that he now retains the money. If so, the action could not have been maintained in that county according to this statute. It was not his duty to return the extents, or to pay the money, to any one, or into any office, in that county. Be all this as it may, defendants are too late to avail themselves of this objection. The 43d section, (Stat. 70,) merely enacts, that such

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surety or sureties shall be allowed all the advantages *on trial* upon such *scire facias*, which by law the principal might have had in the original action. No one surely will pretend, then, this could have intended to give the sureties an opportunity to avail themselves of any *dilatory objections* to the original proceedings, but only of such as go to the merits, and of which the original defendant might have availed himself on the trial of an issue of law or fact. The defendants are equally lame as to any advantage to be derived from the proviso to the 2nd section of the statute of 1809, *p.* 102. This saves to the "bondsmen's surety or sureties" all the advantages on the *scire facias* that might or could have been taken had debt been brought on the recognizance entered into by the sheriff or high bailiff, their surety or sureties." In all cases of a debt of record, whether it be by judgement or recognizance, the law gives a remedy to the party either of debt or of *scire facias* grounded on the record. Suppose this action had been debt on the recognizance instead of *scire facias* on the judgement, could defendants have availed themselves of any dilatory objections to the original proceeding against the sheriff? This surely cannot and will not be pretended. It is further obvious that the sheriff can be guilty of no default or unfaithfulness in duty out of his county, having no powers elsewhere except in the return of process served in his own, but returnable to some other county. The legislature must have had this very case in view; they would otherwise have said, that the sheriff's bail should be sued in his own county. As the bail might live in a county different from the sheriff, it might have been intended to prevent their being sued in such case in their own county.

However important the facts stated in the plea are, they are so inartificially stated that one is led to believe, that the plea was only intended to induce a demurrer from the plaintiff in order that defendants might avail themselves of some supposed defects in the declaration. Some facts stated in the plea appear from the declaration, and if they can avail defendants, they need scarcely to have been stated in the plea. Of this character is his not issuing extents against the sheriff directed to the high bailiff, but instead thereof instituting an action at law. This last seems to constitute the principal objection to the declaration. We will, therefore, first examine it. It is admitted that the statute *for the collection of taxes*, or the statute *relating to the treasury department*, does not in terms give the treasurer a remedy in such case by action at law.—*Stat. p.* 400, 407. Nor do these statutes take

away such remedy if other statutes, or the principles of common law, afford it. It is believed, that wherever the common or statute law imposes a duty on any officer, they generally, by implication, give a remedy for the breach or neglect of such duty by action; and that where the statute furnishes another remedy, such remedy is merely cumulative. The statute, relating to sheriffs, bailiffs, and constables, (*sec. 10,*) makes it the duty of such officers to receive all writs at all times and places, and to execute the same agreeably to the directions therein given, imposes a penalty for refusing or neglecting to serve any such writ or process, and makes them amenable, for refusing or neglecting to serve any such writ, or to make return thereof, to pay the party grieved all damages thereby sustained, and costs. Is not an extent a writ or process? and is not the treasurer, in his capacity, injured and aggrieved by the neglect of the sheriff to execute and return it? If the statutes furnished no remedy by extents, would any one doubt that an action would lie under this statute for such neglect? The *Stat. no. 3, p. 207*, relating to the sheriff department, (*sec. 2,*) expressly provides, that if any sheriff becomes chargeable for any laches or neglect of duty in not duly levying or returning any writ of execution or extent, or in consequence of not duly paying over any money levied or collected on any execution or extent, and judgement shall be therefor rendered against such sheriff, and he shall be committed to jail on execution granted in such judgement, the high bailiff shall do all the duties of sheriff, &c. The legislature in passing this act certainly considered the sheriff liable to an action for not levying and collecting and returning extents. The statute for *the collection of taxes*, (*sec. 10, p. 203,*) enacts, that every sheriff, to whom any extents shall be directed, is hereby required forthwith to serve the same, and to pay such taxes collected, into the treasury. The *11 section* of the same act speaks of the sheriff making a *non est inventus* return on such extents, &c. It then directs, that if any such sheriff shall neglect or refuse to execute any such extent, or to return the same, for sixty days, and the treasurer shall issue his extent to the high bailiff, &c. &c. Is not then the neglect of the sheriff to collect and return such extent, or to pay over the money, a breach of duty imposed on him by law? and if so, is it not a breach of the condition of the sheriff's bond? And though the statute furnishes a remedy by extent against the sheriff, yet will not an action lie against the sheriff, and subsequently against his bail? But suppose the doctrine contended for be correct, what is the result? The treasurer issues his extent against the sheriff, and for want of goods, chattels, or estate, he is committed, and re-

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mains in jail. The statute furnishes no further remedy. The sheriff has committed a breach of duty, and of the condition of the bond ; but the law is so impotent, that it can afford no redress ; the demand is lost to the state. The judiciary statute (*no. 22, sec. 1.*) seems to take it for granted that every sheriff and his bail are liable for any and every neglect, default, or unfaithfulness in his office and duty, and that, therefore, they may be sued and have judgement against them, and points out the mode of proceeding, &c. The statute relating to the treasury department (*sec. 2,*) makes it the duty of the treasurer annually, &c., to issue extents, or commence actions, as the case may require, against the several sheriffs, high bailiffs, constables, and other collectors, who shall have been delinquent in the collection and payment of taxes, &c., &c. This certainly seems to suppose that sheriffs and other officers who are delinquent, &c., may be liable to action as well as extent. Indeed, the position has never been doubted till the decision of the case the *Treasurer vs. Holmes and others, 2 Aikens' Rep. 48.* It is believed that the decision in that case does not materially affect the present question. The only question which that case presented was, whether a *scire facias* would lie against the sheriff's bail without a previous suit and judgement against the sheriff fixing and ascertaining the amount of his liability. The decision was, that a *scire facias* would not lie in such case. This decision was certainly correct, unless the act of the legislature granting a tax, and the subsequent proceeding by extent, &c., are to be regarded so far in the nature of a debt or judgement of record and execution, as to bring them within the meaning of the statute of 1809, (*sec. 1, p. 102.*) But the question whether an action would lie against the sheriff in favor of the treasurer for neglecting to serve and return an extent, was not before the court, nor at all necessarily decided in deciding the cause. And though it is true that the judge, in delivering the opinion of the court, does say, that such action will not lie, yet, it is believed, the court is not to be considered as coinciding with the learned judge who delivers the opinion, any further than his remarks are necessary in deciding the question, on which the cause turns. Nor is the judge, who delivers the opinion, supposed to examine with scrupulous care and attention the effect and tendency of such suggestions as he may incidentally throw out, and which are not necessary in deciding the cause before them. With all my respect for the learned judge who delivered the opinion of the court, I cannot subscribe to his opinion, that no action will lie,



r of the treasurer against the sheriff, for not levying, &c., an

It is not perceived that any reason whatever is assigned opinion, except that the statute (i. e. the statute for the collection of taxes) does not in terms prescribe this remedy by action. The judge adopts the language of *C. J. Spencer*, in the case of *the People vs. Speaker*, viz., "The settled principle with respect to sureties is, that they are not to be made liable unless they are brought within the very terms and scope of their undertaking—18 *John. Rep.* 390." The very terms and scope of the undertaking is, that the sheriff shall faithfully discharge the duties of his office. The statute declares it to be his duty to receive, collect, and return, all extents delivered to him, and to pay the money collected into the treasury. The condition of the bond is then broken if the sheriff has not discharged this duty. What then is the difficulty? The answer is, this statute directs an extent to be issued in such case, and does not in terms say the sheriff shall be liable to an action. But other statutes make him liable for every breach or neglect of duty, and so do the principles of common law, as applicable to the case, and to the bond, make the sheriff liable in the first instance to an action, and his bail also, when his liability is fixed by a judgement. See *U. S. vs. Kirkpatrick et al.* 9 *Wheat. Rep.* 720; and *Dox vs. Postmaster General*, 1 *Pet. Rep.* 318, where the doctrine we contend for was fully established by the Supreme Court of the United States.

Another question which may arise on the face of the declaration is, whether the bond can be good, being taken by one of the side judges of the county court, instead of the *first judge of the county court*, according to the 27th section of the frame of government in the constitution of this state, under any circumstances; or in other words, whether the statute directing, "that in the absence of the chief justice, any other judge of the same court may take the bond," is unconstitutional and void. The constitution uses the words *first judge*, instead of chief justice. We think it may be fairly contended that the judge first appointed, as a judge of the county court, is, strictly speaking, the *first judge* of the county court. He surely is the first appointed, *eo nomine*, as judge of the county court. The judges of the Supreme Court are not judges of the county courts by appointment; that is, they are not appointed as such, but made presiding judges of the county courts by statute, not by appointment. They are not, therefore, strictly speaking, judges of the county courts. The *first side judge*, as the courts are now constituted, is the *first*

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*judge* of the county court within the letter and spirit of the constitution. Whether the legislature can direct by law any other mode of taking the sheriff's bonds than that pointed out, and whether a bond taken in pursuance of such directions would be good, or, in other words, whether the judges of the Supreme Court, setting as judges of the county courts, can take such bonds, must be left till such question arises in due course of legal proceedings.

There are *two*, perhaps three or four other questions brought upon the record by the plea in bar, and which do not arise on the face of the declaration, and which it may be supposed the defendants rely on ; but they are stated in such loose manner that one can scarcely tell whether they are relied on or not. 1st. That the extents against the constables were not issued within thirty days after the rising of the general assembly next after the taxes became payable into the treasury, according to the act relating to the treasury department, *sec. 2*, making the duty of the treasurer so to issue them.—*Stat. 407*. 2nd. That the treasurer by not issuing them within said thirty days, but issuing them long after, viz. in October, 1828, relieved the bail taken for the year commencing in December, 1826, from the responsibility of the good conduct of the sheriff, and left the responsibility to rest on defendants, the bail for the year commencing in December, 1827, according to his duty imposed by the same act. 3d. That the treasurer did not issue his extents against the sheriff within thirty days after the rising of the general assembly in October, 1829 ; the sheriff then being good and responsible. 4th. That he instituted the action on which this *scire facias* is grounded, and in that action neglected to attach property, and the sheriff, before execution issued, viz. in July, 1830, had become insolvent ; whereby the treasurer's claim was lost. It may be answered that the 2nd section of the act, referred to, makes it the duty of the treasurer to issue extents against all officers liable to them, within thirty days, &c., for the mere purpose of making him responsible to the state in case of neglect for all such sums as were due from such officers, and not to confer any benefit or privilege on them or their bail. If the treasurer has a right of action for any delinquencies of the officers charged with the collection of taxes, this statute does not take away such remedy.

But the plea seems to suppose that these neglects of the treasurer operate to release the bail from their liability for the sheriff's omission of duty ; and in relation to this effect they may all be

considered at once. The delay in regard to two of the extents against the constables was for two years after they should have been issued according to the requisitions of this act, and as to the other, it was one year only. 1st. The treasurer, regarding himself as responsible under that act for his neglect, had the right to use his discretion as to the time of issuing these extents against the constables; and it seems to be a matter with which the sheriff's bail, who became liable for his subsequent omission, have nothing to do. 2nd. The idea of throwing the responsibility on to one set of bail, rather than another, being an excuse, seems quite idle. A creditor may take execution on his judgement at any time within the year. Taking it after rather than before the first of December, and giving it out, and thereby throwing the responsibility on to a different set of bail, would certainly be an idle excuse for such bail. 3rd. In relation to issuing an extent against the sheriff, it may be answered, that this depends on the question, whether in such case the sheriff is liable to an action at all, and so whether the remedy by extent is merely cumulative. Issuing the extent would probably have ended in the commitment of the sheriff, and his remaining in jail, and so the plaintiff would have lost his remedy against the bail, according to the decision in the *Treasurer vs. Holmes and others*, 2 Aikens', 48. The New York cases on the subject of delay to collect, as it effects sureties, are familiar to the bar. It seems now perfectly well settled in that state, *that mere delay for any length of time whatever will not release the sureties; that an agreement by the creditors with the principle to wait any given time beyond the time stipulated in the security, without the consent of the sureties, will discharge them.* Whether a neglect to sue and collect the money of the principal, *after being requested* by the sureties, will discharge the sureties, is not well settled. In the case of *The People vs. Jansen*, (7 Johns. Rep. 312,) it was decided, that a neglect for ten or twelve years to sue, &c., was a release of the sureties. In *Paine vs. Packard*, (13 Johns. Rep. 174,) this doctrine was overruled, and it was however decided, that if the creditor neglect to sue after being requested by sureties to sue, and the principal afterwards fail, the surety is discharged. In *Fulton vs. Matthews*, (15 Johns. Rep. 433,) the plea was mere delay on the part of creditor, when there had been no request to sue, and the plaintiff had judgement. In *Powell vs. Waters*, (17 Johns. Rep. 176,) there was the same decision. In *King vs. Baldwin*, (2 J. C. Rep. 554,) the chancellor decided that delay after re-

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quest by surety would not release the surety. But in *King vs. Baldwin*, (17 Johns. Rep. 384,) in the supreme court of errors, this question was reversed by the casting vote of the president, *Lieut. Gov. Taylor*. It is believed that the modern English decisions coincide with the cases just referred to. There is then no pretence that the delay of a year or two, as in the present case, can release the bail. In *Dox vs. Post Master General*, (3 Pet. Com. Rep. 394, and *Dox vs. P. M. G.*, 1 Pet. 325,) it is decided, that the claims of the U. S. upon an official bond, and upon all parties thereto, is not released by laches of the officers to whom the assertion of the claim is intrusted by law. Such laches have no effect whatever on the rights of the U. S. as well against the principal as against the sureties. This case has been before referred to and observed upon, in relation to the defendant's plea in bar. There are two pleas in bar, in the last case cited, nearly similar in amount to the defence set up in the case at bar. One sets up that the principal, *Gerill L. Dox*, was removed from office, 1st July, 1816; that the *P. M. G.* knowing there were sureties, did not open an account with the principal, nor make any claim or demand of him, as post master, until July, 1821; that then he did open an account, and claim and demand of *Gerill L. Dox*, \$3041,35.; that *G. L. Dox*, at the time of his removal, was solvent, and able to pay his debts, and continued so for three years, and then became insolvent, &c. &c. Another plea to the same effect was filed to another breach assigned to the bond. Issue was taken on these pleas, and a verdict was found on them for the defendants. On the other issues verdicts were for the plaintiff, and damages assessed at \$6000. These pleas in bar covered the plaintiff's whole cause of action. On motion in the district court, judgement was entered for the plaintiff, notwithstanding the verdict, and this was affirmed in the Supreme Court. This case fully justifies the plaintiff, in demurring to the plea in bar, and shows that there is nothing in the facts stated which amounts to a defence.

There are two averments in the declaration which are traversed, and issue joined on them. The first is, that Wm. A. Palmer, Esq. was *first side judge* of the county court of Caledonia county when he took the bond in question. The second, that the chief justice of the county was then absent from the county. The journals of the general assembly were offered in support of the first, and parol proof in support of the other. It was objected to the proof offered in both points, that these facts should have

appeared from the record of the recognizance. The first is an immaterial issue, except it be supposed his being first side judge brings him within the constitutional provision of *first judge* of the county court. If this makes him *first judge*, and so the bond good, in fact, according to that provision, surely this may be shown, (though it appear not in the face of the bond,) by the record of his appointment. If he acted officially as judge, it must be that he acted in the capacity in which he was appointed to act. The office of a judge of a court of law is an office of notoriety, and the court will take notice of such office as being what his appointment makes him; without proof. The absence of the chief justice is mere matter *in pais*, and must of necessity be proved by parol. If it had been certified in the doing of the side judge in taking the bond, it would not have proved the fact. It must still have been proved by some other testimony, if it needed proof. But the court will presume from the very fact, that a side judge acted on the occasion, that the chief justice was absent; and the fact is as well sustained by this presumption as if it had been certified in the record of the recognizance. It is contended that, notwithstanding the requisition of the constitution, the sheriff shall give security before *the first judge* of the county court, yet the legislature may point out other modes of taking bonds from such officer, and that such bond, taken in pursuance of such provision, will be good. It is observable that by the 27th section of the constitution, the *manner* and *sum* in which the bonds should be taken, is left to be decided by the legislature. Nothing could have been intended as being imperative in the legislature in the expression, *first judge*; and nothing can be more unimportant in itself than the question, whether the act should be done before one or another judge of the same court. We think, therefore, that any one, officiating as judge of the county court, may take bonds from the sheriff, and that such bond so taken will be sufficiently within both the letter and spirit of the constitution and the statute.

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*Mr. Collamer for the defendant.*—I. The first question arises on a plea in abatement. The statute requires that *scire facias* against sheriff's bail shall be brought in the county where the default or neglect, sued for, happens.—*Statute, page 102.* This is *scire facias* for the default or neglect of the sheriff of Caledonia county in "not serving and returning according to law, and the precept thereof, three certain extents" against constables for state taxes. Now the question is, should this be sued in Caledo-

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nia county? The defendants insist, that the default or neglect declared for, happened in said county of Caledonia. Neglects in themselves have no locality; they are neglects every where: but all official neglects happen in the official precinct; and it cannot be said an officer commits a neglect or default in a county to which he does not belong, and in which, perhaps, he never was. By any other construction, the said direction of the statute is rendered nugatory.

II. The next question arising on the demurrer to the first plea in bar, is as to the sufficiency of that plea. The substantive principle, on which the plea is founded, is, that the treasurer is fully directed by statute how and *when* to issue his extents for collecting taxes; and has not power to issue them at other times, and thereby visit the responsibility on others. By neglecting to issue an extent against *Fuller* when directed by law, a case has accrued, in his failure, which is now attempted to be visited on *Fuller's* bail. —*Stat. p. 404.* By neglecting seasonably to issue extent, the treasurer has made himself chargeable to the state; and he, like a sheriff, has no right to neglect his duty in collection, and then have suit to indemnify himself for his own neglects.—15 *John. Rep.* 256, *Thomson vs. Lockwood*; *Bray. Rep.* 24, *Flagg vs. Walker*; 7 *John. Rep.* 426, *Reed vs. B—— and Staats*; 7 *John. Rep.* 319.

III. Under the operation of this demurrer the defendants insist that said declaration is insufficient. It declares on a recognizance taken before the first side judge of Caledonia county, for the faithful discharge of the duty of *sheriff*, when the constitution requires it to be taken by the first judge or chief judge. The first side judge is not the first judge of said court. The statute authorizing either side judge to take such bail is unconstitutional and void. The legislature might as well have authorized a justice of the peace to take it. These defendants are not foreclosed by the judgement against the sheriff from examining into the same, and shewing it unfounded, as it was *res inter alios acta*; and this right is preserved to them by statute; and the defendants insist, that said suit was not legally maintainable, (*Stat* 102;) for the mode of enforcing taxes is provided for by statute, and is a *system* by itself, and furnishes all the security the government requires; and if more is necessary, the legislature are to provide it. The statute does not authorize a proceeding by *suit* against the sheriff, but by extent.—2 *Aikens' Rep.* 48, *Treasurer vs. Holmes et al.* That was a sufficient security in this case, had it been seasonably pur-

sued; and if not the *treasurer* must pay. To hold otherwise, extends the liability of the bail beyond what was contemplated when entered into. The record of judgement and execution, and the record of neglect and extent, are equally high in evidence, and, therefore, the latter not merged in the former, and, therefore, no judgement could be obtained, as it answered none of the legitimate purposes of a judgement.

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IV. The defendants insist there was error in the admission of testimony, on the trial of the issue of the second plea in bar. Even should the court think that the first side judge may, under the statute, take a sheriff's bond, still, the defendants insist it must appear *by the bond* that the person taking it *was* of that capacity, and *acted* in that capacity, neither of which appear by this bond; and that the same cannot be supplied by testimony *aliunde* as was here permitted. Besides, the recognizance did not support the issue as to the first side judge. The contingency on which the side judge is permitted to act should appear by the record of the recognizance, and not be supplied by parol.

BAYLIES, J., *delivered the opinion of the Court.*—As the treasurer of the state resided at Woodstock, in Windsor county, and here kept his office, it was the duty of *Nathan Fuller*, as sheriff of Caledonia county, if he collected the money on said extents, to have paid it to the treasurer at his office; or if said *Fuller* did not collect the money, it was his duty to have returned said extents to the treasurer at his said office. But as *Fuller* did not pay over the money, nor return the extents, it may be said, that he, as sheriff, neglected his duty in Windsor county, and was sueable here for this neglect. I conclude, that the action against *Fuller* was rightly brought in Windsor county, and was not *abateable*, because it was not brought in Caledonia county, where *Fuller* was sheriff. I therefore consider, the county court did right in overruling the plea of abatement to this *scire facias*.

I will now pass to the *first plea in bar*, and enquire, whether the treasurer of the state had a right to maintain his action at law against *Fuller*, as sheriff, for his neglect of duty in collecting and returning the extents, which the treasurer put into his hands to collect and return? After duly considering the authorities referred to by counsel, and the several statutes, which have a bearing upon the question, I am satisfied, the treasurer had a right to maintain his action at law against *Fuller*, as sheriff, for his neglect. The treasurer, having a right by statute to issue his extent against the



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sheriff for his neglect, was not thereby deprived of his common law, or statutory right, to sue for the same neglect : these different remedies were concurrent.

Under the first plea in bar, the defendants call on the Court to decide, whether the delays of the treasurer to issue his extents against the constables and sheriff, did not discharge the defendants from their liability ? If we consider the treasurer, as it respects this transaction, in the light of a creditor, and *Fuller*, the sheriff, as principal debtor, and the defendants as sureties for *Fuller*, there can be but little doubt as to the liability of the defendants. If the creditor tie his hands by contract with the principal debtor, so that he cannot sue him for his debt, this will discharge the sureties. But if the creditor does not tie his hands, and neglects ever so long to sue the principal debtor, such neglect will not discharge the sureties. And if the creditor is requested by the sureties to sue the principal debtor, and collect the debt, and the creditor neglects or refuses to sue, this will not discharge the sureties from their liability.

But a request to sue, and an offer to save the creditor harmless against costs, and a subsequent neglect of the creditor to sue, may furnish ground for a court of equity to decree the demand to be put in suit, that the money may be collected of the principal debtor, and his sureties be saved harmless. In support of the above principles, see *Hubbards vs. Thos. Davis et al.* 1 Aik. 296 ; *Hogaboom vs. Herrick*, ante, 131 ; *Darey vs. Prendergrass*, 7 Com. Law Rep. 62 ; *Orme vs. Young*, 1 Holt's Rep. 84 ; 3 Com. Law Rep. 35 ; *Heath vs. Key*, 1 Young and Jarvis, 434 ; *Eyre vs. Everett*, 2 Russell, 381.

But the defendants do not accuse the treasurer of having tied his hands, so that he could not issue his extents ; but they charge him with negligence. A mere neglect to issue the extents will not exonerate the defendants from their liability.

Under the demurrer to the first plea in bar the defendants insist that the plaintiff's declaration is insufficient in the law, inasmuch as it counts on a recognizance entered into by the sheriff and his bail before the *first side judge* of Caledonia county, and not before the *first judge*. This is a constitutional question of no small importance, as the decision of it may affect sheriff's sureties to a large amount. In deciding this question, it may be well to take into consideration the constitutions and statutes of this state, from the first organization of the government to the present time, so far as they may have a bearing. The constitution of 1777,

ch. 2, s. 27, says, "That the general Assembly, when legally formed, shall appoint times and places for county elections, and at such times and places the freemen in each county respectively, shall have the liberty of choosing the judges of inferior courts of common pleas, sheriffs, justices of the peace, and judges of probates, commissioned by the governor and council, during good behaviour, removable by the general assembly upon proof of mal-administration."

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By an act of 1779, the sheriff, when appointed as above, was required to "become bound before the governor and council with two sufficient sureties, freeholders in this state, by a recognizance in the sum of two thousand pounds, for the faithful administration, and discharge of said office, and for the answering all such damages as any person or persons shall sustain, by any unfaithfulness, or neglect in the same."—(*Vt. State Papers*, 252, 348.)

The above 26th section of the constitution of 1777, enabled the people to choose their sheriffs, who were to hold their office during good behaviour—removable by the legislature upon proof of mal-administration. But this mode of electing sheriffs, and giving bonds before the governor and council, was soon changed. By the constitution of 1786, ch. 2, s. 9, the general assembly in conjunction with the council, were empowered to elect *sheriffs* annually, or oftener, if need be. And the 24th section of the same chapter says, "The treasurer of the state shall, before the governor and council, give sufficient security to the secretary of state, in behalf of the general assembly, and each *high sheriff* before the *first judge* of the county court, to the treasurer of their respective counties, previous to their respectively entering upon the execution of their offices, in *such manner* and in *such sum*, as shall be directed by the legislature." Under this constitution the act of 1787, was passed, which says, "The sheriffs shall become bound to the treasurers of their respective counties, before the *first judge* of the county court, with two sufficient sureties, freeholders, within this state, by a recognizance in the sum of three hundred pounds, for the faithful discharge of said office, and for the answering all such damages as any person or persons shall sustain by any unfaithfulness, or neglect in the same."—(*Haswell's Ed. of the laws*, 161.)

This act made no provision, that in case the *first judge* was dead, or absent, the sheriff might give his security to the county treasurer before *either of the assistant judges*. This omission was considered a defect. But the constitution of 1786 ceased,

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and the constitution of 1793 was adopted.—*Ch. 2, s. 9*, of this constitution, enabled the general assembly in conjunction with the council to appoint sheriffs annually. And the 27th section of this chapter is precisely the same as the 24th section of the constitution of 1786. Under the constitution of 1793, the act of 1797 was passed, which says, “The sheriff shall become bound by way of recognizance to the treasurer of the county of which he is sheriff, before the *chief judge* of the county court, (and in case of death or absence of the chief judge, before *one of the assistant judges*,) with two or more sufficient sureties, freeholders within this state, in the sum of ten thousand dollars, for the faithful discharge and performance of the duties of his office, and every part thereof; and shall take the oath of office, before the judge taking such recognizance, which shall be certified on his said commission.”—(*Slade's Ed. p. 200.*) By this act, the evil that was experienced under the act of 1787, was remedied; that is, if the *first* or *chief* judge be dead, or absent, the sheriff might give security before *either assistant judge*. But had the legislature power to pass this act to enable the sheriff to give security before *either assistant judge*, when the 27th section above required the security to be given before the *first* judge of the county court? There is nothing in the constitution, that expressly negates the power of the legislature to pass this act. I consider this act gives a legislative construction to the 27th section of the constitution; and after a practice of thirty four years in conformity to this act, it is too late to call in question its validity. In the case of *Stuart vs. Laird*, (1 *Cranch*, 300,) the court decide, that a contemporary exposition of the constitution, practised and acquiesced under for a period of years, fixes the construction; and the court will not shake or control it. At any rate, it is not the duty of this Court to pronounce the act of 1797 unconstitutional and void, when it is not manifestly so. In this case, the sheriff gave his security before one of the *assistant* judges of the county court, in the *absence* of the *first* or *chief* judge; therefore, the security is considered good.

The act of 1825, says, “the sheriff's and high bailiff's bonds may be taken by either judge of the county court.” If the sheriff's bonds be taken before one of the *assistant* judges of the county court, in the *presence* of the *chief* judge of said court, it is doubtful whether such bonds would be good.

It is not perceived, that the county court improperly admitted, or rejected evidence on the trial of the issue of fact under the se-

cond plea in bar. All the exceptions of the defendants are overruled, and the judgement of the county court, in favor of the plaintiff, is affirmed with additional costs.

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HENRY BRACKETT and his wife, CLARA BRACKETT vs. DANIEL WAITE, Jr. and J. MOULTON.

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Where one in prosperous circumstances, and not much embarrassed with debts, in consideration of natural love and affection, made a voluntary conveyance to his daughter of a portion of his estate, leaving amply sufficient to pay all he owed,—it was held that such conveyance was good and valid against a subsequent mortgage given to secure a debt existing previous to the voluntary conveyance.

If a voluntary conveyance be good and valid in law at the time it is made, it will not be rendered fraudulent by subsequent events by which the grantor becomes insolvent.

This was an action of *ejectment* for certain lands in Braintree. Plea, the *general issue*. At the trial in the county court it appeared in evidence, that on the 18th day of May, 1830, the premises in question were owned by one William Ford, who on the same day, voluntarily conveyed them to his daughter, *Clara Brackett*, one of the plaintiffs. The deed expressed a consideration of three thousand dollars, though it appeared to have been given in consideration of natural love and affection only. On the 28th day of July, 1830, Ford executed a mortgage deed of the same premises to the defendant, *Waite*, to secure him for certain promisory notes executed to *Waite* previous to the conveyance by Ford to his daughter, amounting to about one thousand dollars. Soon after the execution of the mortgage deed, Ford died, and the defendant, *Waite*, subsequently procured from Ford's administrator a deed of the equity of redemption. The mortgage deed to *Waite* was recorded the same day on which it was executed; but the deed to *Mrs. Brackett* was not recorded, nor lodged for record, till the 8th day of November following. The plaintiffs offered evidence tending to prove that the mortgage deed to *Waite* was executed by Ford, and sent to the town clerk's office for record, in the absence of *Waite*, and without his knowledge; that soon after the messenger was sent, with the mortgage, to the town clerk's office, *Waite* returned, and was informed of what had been done, and at the same time was told that it was suspected the deed to the plaintiff, *Mrs. Brackett*, was void; that *Waite* expressed his satisfaction at what had been done with regard to the mortgage deed. The plaintiffs also produced evi-

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dence tending to prove that Ford, at the date of the deed to his daughter, *Mrs. Brackett*, and up to the 16th July, 1830, owned estate to the value of more than sixty thousand dollars. To obviate the effect of this evidence, the defendants adduced testimony tending to show, that on the 26th July, 1830, property belonging to Ford, to the value of about fifty thousand dollars, was destroyed by a freshet; that he then immediately became insolvent, and afterwards so died. The defendant also produced evidence tending to prove, that Ford, at the time of the conveyance to *Mrs. Brackett*, was indebted to *Waite* and others to the amount of sixteen thousand dollars. The plaintiffs requested the court to charge the jury, that if they believed Ford, on the 19th of May, 1830, was solvent, and was owner of attachable property, amply sufficient to secure all his debts, the deed of that date to plaintiff, *Mrs. Brackett*, was valid, though made on the consideration of natural affection only; and that the subsequent losses and insolvency of Ford would not make said deed void as to *Waite*. But the court instructed the jury, that *Waite* was to be viewed as a creditor of Ford, whose debt existed before the 19th of May, 1830, and that, as to such creditors, the deed to *Mrs. Brackett* made for natural love and affection only, was void, though the grantor, at the time, was solvent, and had visible property amply sufficient to pay all his debts, if he afterwards became insolvent. The jury returned a verdict for the defendants. The plaintiffs filed exceptions to the charge to the jury, and also to a decision of the court admitting in evidence the mortgage deed and notes; whereupon the cause was brought up to this Court on a motion for a new trial.

*Mr. Collamer, for the plaintiffs.*—The mortgage to *Waite*, not having been received by him, and being yet within the control of Ford, when *Waite* was informed of the deed to *C. Brackett*, *Waite* took it subject to *Brackett's* deed; and the question is, was that void as to *Waite*?

I. *Waite* claims as purchaser, and insists that the previous voluntary conveyance is void as to a subsequent purchaser for good consideration, even with notice. 1st. In answer to this, it is contended for the plaintiffs, that *Waite* cannot claim as a creditor and purchaser by the same conveyance. A mortgage is a mere security for the debt, and the mortgagee yet a creditor. 2nd. As to the conveyance from the administrator of the equity of redemption, that is not such a purchase as enables the purchaser so avoid

the previous voluntary conveyance.—*Rob. on Fraud*, 30–40. The previous voluntary conveyance is made void as to subsequent purchasers by relation. The subsequent conveyance by the grantor is taken as evidence of his previous fraudulent intent, and so his first conveyance rendered void. But a sale by his administrator cannot furnish such evidence. 3rd. The plaintiffs insist that the whole of the doctrine for which the defendants contend is founded on the 27th of *Elizabeth*, which has not been here adopted.—4 *Cowen's Rep.* 599, *Jackson ex dem. Steward vs. Town*. That statute, and the decisions upon it, is one of those artificial contrivances to which England has resorted as a guard against fraud in a particular form. It creates a conclusive legal presumption to guard subsequent purchasers. In this country no such evil exists. Security is found in our registry system, and, therefore, that statute has never been here adopted. That statute has none of those words, “declare,” &c., on which the courts in England have ever laid stress, as making the 13th of *Elizabeth* an act *declaratory*.

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II. The main question in this case, and the one on which the case was put by the court is, was the voluntary conveyance absolutely *void* as to creditors? 1st. The plaintiffs insist that the statute of 13th of *Elizabeth* differs from ours in this: The statute of *Elizabeth* declares the sale void, as to all whose rights “*are, shall, or might be*” affected.—*Rob. on Frauds*, 3. Ours affects those only *intended* to be affected. 2nd. Voluntary conveyances will be found, on examination into all the authorities, never, even in England, to have been holden as more than *presumptively* fraudulent as to creditors, not absolutely *void*, as decided in this case by the court. Such conveyances have only been set aside in chancery when unexplained; they have not been treated as *void*. The subsequent nonpayment of his debts by the grantor has been coupled with his previous voluntary conveyance, and made presumptive evidence of fraudulent intent in that conveyance. For if the conveyance was good when made, it is ever good. Still, these subsequent conveyances are subject to examination; and if it can be shown that, when the conveyance was made, enough of property remained for creditors, and thus the intent of the grantor, at that time, shown to be fair; and if the subsequent non-payment can be explained, as not resulting from his acts intended from the beginning, but as arising from calamities which no human foresight or prudence could have anticipated, or avoided, then this presumption is rebutted. This has been so holden

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after the most full investigation of all the authorities, English and American.—8 *Cowen's Rep.* 406, *Seward vs. Van Wyck*; 11 *Wheaton* 214, *Jackson ex dem. Steward vs. Town*; 4 *Cowen*, 599; *Newland on Con.* 384. Such deed is good against subsequent purchasers; and good against creditors, unless the deed deprive them of an ample fund to pay their debts, and the words in the books, "*being indebted at the time*," mean insolvent. 3rd. If the deed does not deprive the creditors of funds for collecting their debts, it is not fraudulent when made; and the happening of contingencies subsequently, cannot divest the title unless they be of such a character as to furnish evidence of fraudulent intent when the conveyance was made.—1 *Aik. Rep.* 116, *Durkee vs. Mahony*. If this were otherwise, every gift of real or personal property would be, at the time void as to creditors, whatever were the circumstances of the giver.—4 *Mass. Rep.* 354, *Drinkwater vs. Drinkwater*; 3 *Mass.* 573. 4th. Even in relation to 27th *Elizabeth*, which has been carried much farther than the 13th, and made more conclusive and imperative, the weight of authority is, that the voluntary conveyance is merely presumptively fraudulent against subsequent purchasers, and that this presumption is subject to be explained.—*Roberts on Frauds*, 17, 61, 69, *where the old authorities are collected*. 5th. It yet remains a question whether under our statute, our courts will create even a presumption of fraud as to voluntary conveyances; but most clearly they will not go, not only to do this, but even exceed the courts in England, deciding on a much stronger statute, and hold that such conveyances are *ipso facto* conclusively fraudulent.

*Mr. Upham, for defendants.*—The mortgage deed to the defendant, *Waite*, having been first recorded, defeats the deed under which the plaintiffs claim. But to avoid this difficulty the plaintiffs insist that *Waite* had notice of their unrecorded deed at the time he took his mortgage, and, for that reason, cannot hold the lands against them. The defendants in reply, say, that the evidence given by the plaintiffs, upon this point, had no tendency whatever to show notice in fact to *Waite* of their unrecorded deed at the time he received his mortgage. The law goes upon the ground that *express* notice of a prior conveyance unrecorded, is equivalent to fraud, and for that reason avoids the subsequent recorded deed.—*D. Chip. Rep.* 42, 49; 8 *Johns. Rep.* 137; 3 *Ves. Jr.* 478; 3 *Atk. Rep.* 654; 1 *Burr. Rep.* 474; *Narcross vs. Widgery*, 2 *Mass.* 509; *McMechan vs. Griffing*, 3 *Pick. Rep.* 149; *Pendleton vs. Button*, 3 *Con. Rep.* 406.



2. We insist that the plaintiffs' deed for several reasons is fraudulent and void against the creditors of the grantor. *First.* It expresses a pecuniary consideration of \$3000, when in fact nothing was paid, or secured to be paid, by the grantee, for the lands conveyed. The only consideration set up in support of the deed is natural love and affection. The deed on the face of it appears to have been executed upon a fair purchase for an adequate price, and to that test the inquiry must be confined. A deed brought forward, as founded on a valuable consideration, cannot be set up as a gift or voluntary conveyance. The party is bound by the consideration alleged. This position is well supported by the following authorities, viz.—*Hildreth vs. Sands*, 2 Johns. Ch. Rep. 43; *Watt vs. Grove*, 2 Sch. & Lef. Rep. 500; *Marigley vs. Hance*, 7 Johns. Rep. 341; *Jackson vs. Delaney*, 4 Cowen's Rep. 427; 2 Ves. 628. *Second.* Had the deed expressed the real consideration upon which it was founded, to wit, natural love and affection, it would have been void under the statute of the 13 Eliz. c. 4, against all the creditors of the grantor, both antecedent and subsequent. It appears from the bill of exceptions that Ford, at the time he made this voluntary conveyance to his daughter, *Clara Brackett*, was in debt to the defendant, *Waite*, and others, to the amount of \$16,000. This fact, if the authorities are to be relied upon, rendered the conveyance void against subsequent, as well as antecedent, creditors.—*Russell vs. Hammond*, 1 Atk. Rep. 13; *Walker vs. Burrows*, Id. 93; *Lord Townsend vs. Windham*, 2 Vern. 10; *Hildreth vs. Sands*, 2 Johns. Ch. Rep. 48; *Reade vs. Livingston*, 3 Johns. Ch. Rep. 481. The doctrine we contend for is supported in all its plenitude of analogies and consequences by the following cases, viz. *Tayler vs. Jones*, 1 Atk. Rep. 600; *Middlecome vs. Marlow*, 2 Atk. 520; *Stileman vs. Ashdown*, 2 Atk. 480; *St. Armand vs. Barbard*, Comyn's Rep. 255; *Stephens vs. Olive*, 2 Bro. 90; *Lusk vs. Wilkinson*, 5 Ves. 387; *Shaw vs. Standysh*, 2 Vern. 326; *Naim vs. Prouse*, 6 Ves. 759; *White vs. Sansom*, 3 Atk. 410; *Fitzer vs. Fitzer*, 2 Atk. 511; *Ridney vs. Causmaker*, 12 Ves. 136; *Hollaway vs. Millard*, 1 Maddock's Ch. Rep. 414; *Bayard vs. Hoffman*, 4 John. Ch. Rep. 450; *Bennett vs. Bedford Bank*, 11 Mass. Rep. 421.

3. The plaintiffs object to the validity of our mortgage deed, because it does not accurately describe the notes intended to be secured by it. In the first place, we maintain, that it is not essential to the validity of a mortgage that it should truly state the

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debt which it is intended to secure.—*Vide Shirras et al. vs. Craig and Mitchel*, 7 *Cranch's Rep.* 34. In the second place, we say, that the notes formed no part of the defendants' title, and it was not necessary to produce them at all on the trial. In fact, they were not produced for the purpose of making out the defendants' title under the mortgage deed, but for the purpose of showing that the debt secured by the mortgage existed before the execution of the plaintiffs voluntary deed. In the third plea, we insist, that the plaintiffs have no right under their voluntary and fraudulent deed, to impeach the validity of our mortgage, on the ground of a clerical mistake in describing the notes intended to be secured by it. Ford, himself, could not do it, and we think the plaintiffs stand on no better ground than their grantor. The defendants are in possession of the lands sued for under their deed, and the plaintiffs cannot oust them without making out a good title in themselves. They must recover upon the strength of their own title, not upon the weakness of ours.—5 *Term Rep.* 110 ; 2 *Term Rep.* 684 ; 1 *East's Rep.* 246.

4. Defendants insist that they can hold the lands in question by virtue of their deed from the administrators on Ford's estate against the plaintiffs' voluntary deed. Under this deed they claim to hold the lands conveyed, as *bona fide* purchasers, against the voluntary grantees of Ford. The administrators, it is true, sold the lands in question to the defendant, *Waite*, at public vendue, for a small sum ; but that does not prejudice his title. His claim is as good under this deed as it would have been under an absolute conveyance from Ford himself before his decease.—*Vide Hildreth vs. Sands*, 2 *John. Ch. Rep.* 50. It was holden by Lord *Ellenborough*, in the case of *Doe. ex dem. Olley vs. Manning*, (9 *East Rep.* 59,) that a voluntary conveyance of lands made in consideration of natural love and affection, is void as against a subsequent purchaser for a valuable consideration, though with notice of the prior conveyance, and though the grantor had other property at the time of such conveyance, and did not appear to be then indebted, and there was no fraud in fact in the transaction : for the law, which is in all cases the judge of fraud and covin arising out of facts and intents, infers fraud in this case, upon the construction of the statute of the 27th *Eliz. c. 4*. In further support of this principle we refer to the following cases, viz. *Colville vs. Parker*, *Cro. Jac.* 158 ; *Rodgers vs. Langhuse*, 1 *Sid.* 133 ; *White vs. Hussey*, *Precedents in Chancery*, 14 ; *Tankius vs. Ennis*, 1 *Eq. Cas. Abr.* 334 ; *White vs. Sansom*, 3 *Atk.* 412 ;

*Lord Townsend vs. Windham*, 2 *Ves.* 10 ; *Roe vs. Milton*, 2 *Wils.* 356 ; *Goodright vs. Masses*, 2 *Sir Wm. Black. Rep.* 1019 ; *Evelyn vs. Templar*, 2 *Bro. Ch. Cas.* 148 ; *Doc ex dem. Bothell vs. Martyn*, 1 *Bos. and Pul. N. P.* 332 ; *Nunn vs. Willsmore*, 8 *Ter. Rep.* 528 ; *Sterrye vs Arden*, 1 *John. Ch. Rep.* 261. Again, the defendants may claim as purchasers under their mortgage deed. Perhaps it may be said, that the cases cited in support of the defendants' title, under the administrators deed, are decisions upon the construction of the statute of the 26th *Eliz.*, and that that statute is not in force here. The 27th *Eliz.* it is true, has not been adopted in this state by legislative enactment, but we consider it merely declaratory of the common law, and in force here, without any such enactment.—*Vide Cadagan vs. Rennett*, *Cowp. Rep.* 434 ; *Roberts on Conveyances*, 10, n. The statute of the 13th *Eliz.* and 27th *Eliz.* it is said have been adopted in many of the states without any legislative enactment, upon the ground that they are merely declaratory of the common law. I do not know of any decision in this state adopting the 27th *Eliz.* ; but I see no reason why it should not be adopted here, as well as in other states, as a part of our common law.—1 *Mass. Rep.* 60, 61. The common law of England was adopted in this state in 1782 by statute ; and I suppose all the English statutes then in force, which were merely declaratory of the common law, were also adopted.

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BAYLIES, J., delivered the opinion of the Court.—It appears that on the 19th May, 1830, William Ford, of Braintree, in Orange county, possessed an estate of the value of \$60,000, and was then owing about \$16,000 ; that for love and natural affection only, the said William Ford then deeded lands of the value of \$1000, lying in said Braintree, to his daughter, Clara, who was the wife of Henry Brackett, jr. ; that on the 16th July, 1830, a flood came, and swept off \$50,000 worth of said Ford's estate, whereupon he was insolvent. At the time said Ford deeded the land to his daughter, Clara, he was owing Daniel Waite about \$1000 on notes, dated 7th July, 1827 ; and to secure the payment of these notes, said Ford on the 28th July, 1830, mortgaged the lands, which he had deeded to his daughter, to said Waite ; and the question is, who has the better right to these lands, the daughter, who claims by her deed, or Waite, who claims by his mortgage. The county court charged the jury, "that said Waite was to be viewed as a creditor of said Ford, whose debt

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existed before said 19th of May, 1830, and that, as to such creditors, the deed of said Ford, made *for love and natural affection only*, was void, though the grantor at the time was solvent, and had visible property amply sufficient to pay all his debts, if he afterwards became insolvent." To support this charge, the defendants rely on the case, *Reade, Administrator of Reade vs. Livingston et al.*, 3 Johns. 481. In that case, Kent, Chancellor, after remarking upon several English cases, says, "The conclusion to be drawn from the cases is, that if the party be indebted at the time of the voluntary settlement, it is *presumed to be fraudulent in respect to such debts, and no circumstance will permit those debts to be affected by the settlement, or repel the legal presumption of fraud*. The presumption of law in this case does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party. There is no such line of distinction set up, or traced in any of the cases. The attempt would be embarrassing, if not dangerous to the rights of the creditors, and prove an inlet to fraud. The law has, therefore, wisely disabled the debtor from making any voluntary settlement of his estate, *to stand in the way of his existing debts*. This is the clear, and uniform doctrine of the cases, and it is sufficient for the decision of the present case." If the law be as it is here stated, no well founded objection can be made to the charge of the county court. But it is believed by this Court, that the principles of law, relating to voluntary settlements, are not understood, in England, precisely as above expressed. In 1 *Roper's Husband and Wife*, p. 307-8, it is said, "The act of the 13th of *Elizabeth*, c. 5, does not make void *voluntary* settlements against *creditors*, but merely declares, that a fraudulent deed shall be void against them. Hence it seems to follow, that although a man be indebted at the time he made a voluntary settlement, yet it is no further void on that account, than as affording a *presumption* of fraud." "This principle will serve as a guide to the understanding of the cases, and the distinctions which have been made; the conclusions to be drawn from which I shall endeavour to collect, and state them shortly.

"If the husband, when he makes the settlement, after marriage, upon his wife, be not indebted at the time, subsequent debts will not defeat it. Upon this point *Ld. Hardwicke*, in *Townshend vs. Windham*. 2 Ves. Sen. 11, thus expressed himself: "If there be a voluntary conveyance of real estate or chattel interest by one not indebted at the time, although he afterwards becomes indebt-

ed, if that voluntary conveyance was for a child, and no particular evidence, or badge of fraud, to deceive or defraud subsequent creditors, that will be good ; but if any mark of fraud, collusion, or intent to deceive subsequent creditors, appears, that will make it void, otherwise not ; but it will stand, though afterwards he becomes indebted.”

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“ If the husband happen to be indebted at the time of making the settlement, the principle of *presumption* before stated, furnishes the following distinction :—If his debts be *considerable*, and the effect of the settlement would be, if substantiated, to defeat the creditors of their demands, then such settlement is void as fraudulent, under the act of the 13th of *Elizabeth*.

“ But it would not be so, it is presumed, if the debts were of *inconsiderable* amount ; because their existence furnishes no presumption of the settlement having been made with an intent to deceive and defraud creditors ; and common sense would revolt at a decision, that a voluntary settlement made by a husband, having a rental of £5000 a year, should be void, if it happened, that when he made such settlement he was indebted in the trifling sum of £100. This point came under *Lord Alvanley's* consideration in *Lush vs. Wilkinson*, 5 *Ves. Jr.* 384.

“ *Newland on Contracts*, p. 383, 4, 5, says : “ I shall now return to the statute of 13th *Eliz.* It will be found by examining the cases on this statute, that there is another circumstance, which has been considered to be a badge of fraud ; I mean where a *voluntary* conveyance is made by a person *indebted at the time*. This is construed to be proof of fraudulent intention with respect to creditors, although the deed may be in consideration of blood or of natural love and affection. *Lord Coke*, in *Twyne's* case, says, when a man, being *greatly indebted* to sundry persons, makes a gift to his son, or any of his blood, without consideration, but only of nature, the law intends a trust between them.”

“ It is material, likewise, to remark, that to impeach a voluntary settlement made on a meritorious consideration, it seems to be necessary, that the person making it, not only should be indebted, but should be *insolvent* at the time. *Lord Alvanley*, in *Lush vs. Wilkinson*, 5 *Ves.* 384, says, “ a single debt will not do ; every man must be indebted for the common bills for his house, though he pays them every week ; it must depend on this, *whether he was in insolvent circumstances at the time.*”

“ And this is certainly the rational construction of the statute, on which we are commenting. For it was intended to prevent

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conveyances of property, made with a design to defraud creditors. When, therefore, a person makes a voluntary settlement of his property, and is at the time in insolvent circumstances, as it must be obvious to him, he is doing an act which must deprive his creditors of the means of procuring the payment of their debts : this is a case, which plainly falls within the statute."

" But to say, that the mere circumstance of the person being indebted at the time, without reference to the comparative state of his debts, and of his means of paying them, shall be a sufficient proof (though the conveyance is on a most meritorious consideration) of fraudulent intention, with respect to his creditors, is to assert, that a person, who, being seized of a landed estate in fee of £1000, settles, after marriage, on his wife a jointure of £30 a year, if he owes £30 at the time, and that sum only, shall be considered to make the settlement with a view to defraud his creditors. If *Lord Alvanley's* idea, therefore, be correct, it will be necessary to remember the sense in which the term "indebted" is used, when applied to these cases."

In the case of *Salmon vs. Bennett*, 1 *Con. Rep.* 525, *Swift, Ch. J.*, gives the opinion of the court as follows : " Fraudulent and voluntary conveyances are void as to creditors ; but in the case of a voluntary conveyance, a distinction is made between the children of the grantor, and strangers. Mere indebtedness at the time will not, in all cases, render a voluntary conveyance void as to creditors, when it is a provision for a child in consideration of love and affection ; for if all gifts by way of settlement to children, by men in affluent and prosperous circumstances, were to be rendered void upon a reverse of fortune, it would involve children in the ruin of their parents, and in many cases might produce a greater evil than that intended to be remedied. Nor will all such conveyances be valid ; for then it would be in the power of parents to provide for their children at the expense of their creditors. Nor is it necessary, that an actual or express intent to defraud creditors should be proved ; for this would be impracticable in many instances, where the conveyance ought not to be established. It may be collected from the circumstances of the case. But in all cases, where such intent can be shown, the conveyance would be void, whether the grantor was indebted, or not. In order to enable parents to make a suitable provision for their children, and to prevent them from defrauding creditors, these principles have been adopted, which appear to be founded in good policy. Where there is no actual fraudulent intent, and a voluntary conveyance is made



to a child in consideration of love and affection, if the grantor is in prosperous circumstances, unembarrassed, and not *considerably* indebted, and the gift is a reasonable provision for the child, according to his state and condition in life, comprehending but a small portion of his estate, leaving ample funds unincumbered for the payment of the grantor's debts, then such conveyance will be valid against debts existing at the time. But though there be no fraudulent intent, yet if the grantor was considerably indebted and embarrassed at the time, and on the eve of a bankruptcy; or if the value of the gift be unreasonable, considering the condition in life of the grantor, disproportioned to his property, and leaving a scanty provision for the payment of his debts; then such conveyance will be void as to creditors."

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*Kent*, chancellor, speaking of the above decision in Connecticut, says, "The court do not refer to authorities in support of their opinion, and, perhaps, they may have intended not to follow, strictly, the decisions at *Westminster Hall*, under the statute 13 *Eliz.* I can only say, that, according to my imperfect view of those decisions, (and by which I consider myself governed,) this case was not decided in conformity to them; but I make this observation with great deference to that court." *Reade vs. Livingston*, (3 J. C. R. 504.) But if I understand the elementary writers, *Newland* and *Roper*, on this subject, they do fully support the opinion delivered by *Swift, Ch. J.*, in the above case. And, in addition, the same principles are advanced by the Supreme Court of the United States in their opinion delivered in the case, *Hendee's Lessee vs. Longworth*, 11 *Wheat.* 213. In this case the court say: "A deed from a parent to a child, for the consideration of love and affection, is not absolutely void as against creditors. It may be so under certain circumstances; but the mere fact of being in debt to a small amount, would not make the deed fraudulent, if it could be shown, that the grantor was in prosperous circumstances, and unembarrassed, and that the gift to the child was a reasonable provision according to his state and condition in life, and leaving enough for the payment of the debts of the grantor. The want of a valuable consideration may be a badge of fraud, but it is only presumptive, and not conclusive evidence of it, and may be met and rebutted by evidence on the other side."

I consider, that the whole doctrine of the law, as to fraudulent conveyances under the statute of 13th *Eliz.* will apply to fraudulent conveyances under our statute, *ch. 32. s. 7, (Slade's Ed.)*



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Now, if we apply the principles of law, as explained by the elementary writers, aforesaid ; and as recognized by the courts of law as aforesaid, to the facts in the case under consideration, we cannot but see, that these facts afford no ground for presumption of fraud in William Ford, at the time he executed his deed to his daughter, *Clara*. For at that time Wm. Ford was in prosperous circumstances—his estate was worth \$60,000, and he owed only \$16,000—his gift to his daughter, *Clara*, was a thousand dollars' worth of land, which left enough of the estate to pay all his debts, and \$43,000 over and above. The gift was not unreasonable, and affords *no presumption*, that it was made to injure creditors. If the deed to the daughter was not fraudulent in the beginning, it was not made so by subsequent events ; such as the waters sweeping off \$50,000 worth of the grantor's property, and rendering him unable to pay his debts. This Court is satisfied, that the county court in their charge, did not instruct the jury according to the principles of law. For this reason alone, we reverse the judgement of the county court, and grant a new trial. The plaintiffs to recover their costs at this Court.



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ISABELLA SMITH vs. JOHN L. WOODS.

Where, in an action of *account*, it appeared the defendant, as the agent of the plaintiff, had taken notes payable to himself, for the benefit of the plaintiff, payable on a certain day at a particular bank, which notes had been accordingly paid by the maker at the time and place appointed, after the commencement of the action,—it was held that such payment was a payment to the defendant, and that he was accountable to the plaintiff for the amount of the notes—a demand having been made on the defendant to account for the notes before the suit was commenced, and he having refused so to do.

In such case an endorsement of the notes by the defendant to the plaintiff, and a delivery of them to the auditor, at the time of the trial, will not be considered an accounting which will discharge the defendant from his liability.

This was an action of *account* against the defendant as bailiff and receiver of certain notes signed by Andy L. Smith, and another person, as his bail ; and of certain monies received by the defendant upon said notes. Plea, *that the defendant was not bailiff and receiver to the plaintiff*. Issue joined, and verdict for the plaintiff, *that the defendant was his bailiff and receiver, and ought to account* ; upon which verdict judgement was rendered by the county court, *that the defendant ought to account*. But on the trial of this issue a number of questions were raised, and decided by the county court, to which the defendant excepted ; and the

exceptions came to this Court, and were decided at their March term, 1831, (*see 3 Ver. Rep. 485,*) when the judgement of the county court was affirmed, and Jeduthan Loomis was appointed auditor to state and report the accounts of the parties to this Court, who at this term made his report accordingly. The report, among other things, stated, that the plaintiff claimed that the defendant account to her for monies received by him to her use, as her bailiff and receiver ; and that the defendant claimed to be allowed against the plaintiff the several sums expressed in his account rendered ; that he had examined and adjusted the said accounts, and found the defendant in arrear to the plaintiff the sum of *one hundred and thirty four dollars and ninety-eight cents*. The report further stated, " That the two last notes with which *Woods* is charged in the account, were of the following tenor, to wit: " For value received we jointly and severally promise to " pay *John L. Woods* or order, at the *Geneva Bank*, one hundred " dollars in four years.—12th April, 1825. *Andy L. Smith, Ira " Davenport.*" Both of the notes were similar, except that one was payable in four, and the other in five years, years. These notes were presented by *Woods* before the auditor on the thirty-first day of August, 1831, and then and there, in the presence of the auditor, endorsed, " without recourse," by *Woods* to said *Isabella*, and laid before the auditor, as and for a delivery of the notes to said *Isabella*, and as accounting for the same. But it was also proved before the auditor, that said two notes had been paid at the *Geneva Bank* by the signers agreeably to the tenor thereof ; which payment was after the commencement of this suit ; and that said *Woods* had notice of said payment long before he endorsed the notes to said *Isabella*. Upon these facts the auditor found and adjudged the said payment to be a payment to *Woods*, for the purpose of charging him with the amount of said two notes in account, as aforesaid. The auditor has deposited the two notes in the hands of the clerk of the Supreme Court, to be delivered to *Woods*, if the report be accepted by said court ; if not accepted, to be delivered to whom said court may order and direct. The auditor further found that before this suit was commenced, said *Isabella* requested *Woods* to settle and account with her in the premises ; and *Woods* neglected and refused so to do."

The defendant filed exceptions to the report, which were now argued by counsel.

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*Smith and Peck, for the defendant.*—1st. The defendant, by taking the notes in question, payable to himself, could not be charged for their amount without some other act, such as claiming them in his own right; for, in order to be available, they must have been made payable to the defendant, or some third person, as the plaintiff, at the time they were executed, was a *feme covert*—the wife of one of the makers.

2nd. The report shews, that at the commencement of the suit, there was a balance due from the plaintiff to defendant of \$75, for his services and expenses as agent to the plaintiff; and it is insisted that, for this balance, he had a lien on all the funds in his hands, which could not be called out until the lien was discharged by a payment or tender of the general balance. This not having been done, judgement should be entered for defendant.

3rd. If the defendant was not chargeable for the amount of the notes, at the time the present suit was instituted, it is difficult to see on what principle he can now be made liable for them. If he is charged, then we have the somewhat novel principle established, that a defendant, who is not liable at the commencement of the suit, may become so in its conclusion, and this, too, by no act of his own. In the case at bar, the court are called upon to charge the defendant for the money paid into the Geneva Bank, for the express and only purpose, of charging him with the costs of this suit, when he refused to receive the money, or in other words, to take it out of the bank. The commencement of this suit operated as a revocation of the defendant's agency; at all events, he had a right to view it as suspending his agency, and all the law would require of him, would be, to preserve the property in his possession from waste. He could not be required to enforce collections and receive payments while the suit was pending, the direct effect of which might be to aid the plaintiff in sustaining her suit. It is true, that in an action on book account, under our statute, the auditor is to audit all claims up to the time of hearing; and admitting the same principle to apply to an action of account at common law, yet it is only to be extended to those cases where property or payments are received *voluntarily*. But,

4th. Depositing the money at the bank was no payment of the notes. Should the plaintiff institute a suit on these notes, the makers, in order to defeat a recovery against them for damages and costs, would be obliged to plead the payment at the bank with a *profert in curia*. The only legal effect of this payment was that of a tender.—(*Carley vs. Vance*, 17 Mass. R. 389; *Eldred vs.*

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*Hawes*, 4 *Con. Rep.* 465 ; *Faden et al. vs. Sharp*. 4 *Joh* 183 ; *Wolcott, admx. vs. Van Santvoord*, 17 *ibid.* 248 ; *vs. Rennards*, 1 *Camp.* 425, n. ; *Lyon vs. Sunding et al* 423 ; *Nichols vs. Bowes*, 2 *Camp.* 496 ; *Fenton et al. vs. dry*, 13 *East.* 459 ; *Saunderson vs. Judge*, 2 *H. Bla.* *Head vs. Sewell*, *Holt's Rep.* 365 ; *Macbridge vs. Wo* 2 *Stark. Rep.* 253 ; *Ca'dwell vs. Cassidy*, 8 *Cowen's* 271 ; *U. S. Bank vs. Smith*, 11 *Wheat.* 171.) If this p be correct, then, the defendant may as well be charged the notes, as for the two that were paid into the bank.

5th. In account, returning the property, as it was at the commencement of the suit, is good accounting ; and the def having delivered up the notes, at the audit, for the use plaintiff, should not be charged for them.

*Burbank*, for plaintiff, contended, that the defendant w countable for the two notes on which the money had been p the defendant, according to the tenor of the notes—that after payment the notes were of no value, and the plaintiff was r der the least obligation to receive them.

BAYLIES, J., delivered the opinion of the Court.—The first points, which the defendant makes, were decided by Court at their last term in this action, and are not now open for discussion.—(3 *Vt. Rep.* 485.) The other points urged by the defendant in argument, may be considered together, and disposed of at once. The defendant contends that depositing the money in bank, was no payment of the notes. Should the plaintiff institute suit on these notes, the makers, in order to defeat a recovery against them for damages and costs, would be obliged to plead payment at the bank with a *profert in curia*. To establish this position, several cases are referred to, in which the following principles are disclosed : To an action upon a promissory note payable at a day and place certain, the defendant pleads in effect, that he was, at the day and place appointed, ready with money to discharge his promise, but the promisee was not to receive it ; and that the money has ever since remained in place for the promisee's use. The plea was held bad, for want of a *profert in curia*.—(17 *Mass.* 389.)

In an action by the payee against the maker of a promissory note, payable at a particular place, a demand at the place specified is not a condition precedent to the plaintiff's right of recovery.

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and need not therefore be averred in the declaration. (4 *Con. Rep.* 465.)

The holder of a bill of exchange need not show a demand of payment of the acceptor, any more than of the maker of a note. It is the business of the acceptor to show, that he was ready, at the day and place appointed, but that no one came to receive the money, and that he was always ready, afterwards to pay.—(4 *John. Rep.* 183.)

If a promissory note is made payable at a particular place, in an action against the maker, there is no necessity for proving, that it was presented there for payment.—(1 *Camp. Rep.* 425, n.)

In an action against the maker of a promissory note, expressed to be payable at a particular place, there is no necessity for proving it was presented there for payment.—(2 *Camp. Rep.* 498.)

In a count against the acceptor of a bill of exchange, stated to be *accepted payable at S. & Co's*, it is sufficient to allege generally a request by the plaintiff to the defendant to pay the bills, without alleging, that it was presented for payment at the particular place.—(13 *East*, 459.)

If A make a promissory note payable to B, or order, with a memorandum upon it, that it will be paid at the house of C, who is A's banker, and, in the course of business, the note is indorsed to C; in an action by C against the endorser, it is not necessary to prove an actual demand on A. If a note be made payable at a particular house, a demand of payment at that house is a demand on the maker.—(2 *H. B.* 509.)

It seems that as against the maker of a promissory note, or against the acceptor of a bill of exchange payable at a particular place, no averment in the declaration, or proof at the trial, of a demand of payment at the place designated is necessary.—(11 *Wheat.* 171.)

I am not disposed to question the correctness of the above principles ; but I do not see, that they can be applied, so as to affect the case at bar. In this case, the report of the auditor says, "*that said two notes had been paid at the Geneva Bank by the signers thereof agreeably to the tenor of said notes.*" Where there was *actual payment* of the notes, as in this case, if the signers were sued on the notes, it would not be necessary for them to plead, that they were ready at the time and place, with their money to pay, &c., and make *profert in curia*, according to 17 *Mass.* 389 ; but they might plead payment specially, or give it in evi-

dence under the general issue. If the money was left at the bank with some third person to pay over to *Woods*, when he called for it, without such person having any authority from *Woods* to receive the money in payment of the notes, the facts should have been so stated in the report. But from the report, we are left to conclude, that *Woods* had an agent at the bank to receive the money, and give him notice. Payment to such agent was payment to *Woods* himself, and he should be accountable for the money received on the notes, and not for the notes themselves, which were rendered of no value by payment. The defendant's exceptions to the report are overruled; the report is accepted by the court, and judgement rendered thereon for the sums reported, with additional costs. The notes are to be disposed of according to said report.

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A justice of the peace may adjourn the taking of a deposition, and verbal notice given to the adverse party of the adjournment is sufficient.

One who is supposed to have conveyed away his property with a view to defraud his creditors, is a competent witness for the purchaser to show that the conveyance was not fraudulent.

Where a deed is executed by the grantor with intent to avoid any right, debt or duty of others, and the grantee knows of such intention, at the time of receiving the deed, such deed is void, though the grantee have no wish to defraud creditors, and pays an adequate consideration for the property.

This was an action of *ejectment* for certain land in Lyndon. Plea, the *general issue*. The plaintiff claimed title to the premises demanded by virtue of a levy of an execution in his favor against one Micajah M. Lowell, which was admitted to be regular, and sufficient to entitle the plaintiff to recover, unless he was defeated by a deed, executed some time previous to the levy, by the said Micajah M. Lowell to the defendant, *Gideon Lowell*. The defendant, *Bennett*, was in possession of the premises as tenant of said *Gideon*. At the trial in the county court, the defendant offered to read the deposition of J. M. Morrill, taken on account of deponent's sickness, by the caption of which it appeared the plaintiff had been duly notified, but did not attend. To the reading of which the plaintiff objected, because he, the plaintiff, had not had legal notice of the time and place of taking said deposition. It was conceded by the plaintiff, he had received a regular citation, citing him to be present at the taking of the deposition, on Saturday the 27th day of August, at Morrill's house, at 9 o'clock, A. M. The deposi-

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tion offered purported to have been taken on Saturday the third day of September, after. The defendants proved that the plaintiff employed one Halsey Riley to be present for him at the taking of the deposition, on said 27th day of August, agreeably to the citation ; that on the 27th day of August, about 10 o'clock in the forenoon, Riley, on his way to attend the taking of the deposition, met the magistrate near Morrill's house, and he informed Riley he had been to Morrill's to take his deposition, and he was so sick it could not be taken at that time ; that he had adjourned the taking of the deposition for one week, to wit, to Saturday, September 3d, at nine o'clock A. M. and requested Riley to inform the plaintiff thereof, and also his counsel ; that Riley did give the information to the plaintiff, and also to his counsel, in time for them, or either of them, to have been present at the taking of the deposition ; that this was the only notice the plaintiff had of the time and place of taking the deposition offered, and that the deposition was taken agreeably to this notice. The objection was overruled, and the deposition read.

The plaintiff then gave evidence tending to prove that, as early as 1824, Micajah M. Lowell was embarrassed, and offered to sell his farm (a part of which was the premises in question) to several persons, requesting them to take a deed of it, and sell it for him, pay themselves well out of it, and pay the balance to him, at the same time telling them he was in debt, and must run away ; and requested them to keep this a secret. He also gave evidence tending to show, that, a short time previous to the execution of the deed of Micajah M. Lowell to *Gideon Lowell*, he, Micajah, told one Hackett, in the presence of the defendant, *Gideon*, that he concluded not to let Hackett have the farm, as they had talked, but was going to let *Gideon* have it, for they would not be so likely to *trustee* him, as they would Hackett ; that after this *Gideon* told Hackett, he should make it appear he paid his brother about a hundred dollars for the farm—fifty dollars to Butler, and let him have an old horse, and a little money, to run away with ; this was a day or two after the date of the deed ; that at one other time he, *Gideon*, on being asked by the plaintiff where Micajah was, said he had run away ; that he had let him have a horse and some money, and he had gone so far that his creditors would not catch him. The defendants then offered Micajah M. Lowell as a witness, to whom the plaintiff objected. But the objection was overruled, and he testified, (having been released from the covenants of his deed by defendant, *Gideon*,) that he told his brother



he was embarrassed, and must sell his farm, and wanted him to buy it; that he declined at first, but finally said if he would take \$350 for it he would buy it; that he was to pay the mortgage of about \$150, a note to Butler of \$50, which *Gideon* was bound for, about \$50 to his father and sister, and one hundred in money down; that upon this condition he executed the deed; that his brother, *Gideon*, paid \$100 in cash, principally in bills, on the execution of the deed; that he let his wife have a small part of it, and carried the rest away to Montreal with him, being about \$70 or \$80; that in about six days, or a week, he went off to Canada; that his brother knew of his going, was present when he started, and furnished a horse for him to ride, and, he thought, some provisions; that at the time of the trade he had not made up his mind to go away, and his brother did not know it till the day before he started; that he thought it was day light when he started; that he went to Montreal with his brother's knowledge, where he had remained till within a short time; that he had no recollection of making the offer to sell his farm, as testified by the witness, and was confident he never did, for he knew such a sale would have been fraudulent; that when he went to Montreal, he thought he could do better by his creditors to go and labour through the summer, which was his intention then to do; that after he had deeded, he made a more full and accurate computation of his debts than before, and found the money would not hold out to pay them.

The court were requested, in their charge to the jury, to instruct them, that if they found the fact, that the deed from Micajah M. Lowell to *Gideon Lowell* was made with a view to avoid the right or debt of any creditor, or any person whatever, the deed was fraudulent and void; that if the deed was not made and executed for a valuable consideration, and *bona fide*, the sale was fraudulent and void as to creditors; that though *Gideon Lowell*, paid an adequate and valuable consideration for the farm, if the transaction was not in good faith, the sale was fraudulent and void as to creditors; that if any portion of the consideration was paid by *Gideon Lowell* to Micajah M. Lowell, to enable him to withdraw himself or his effects from the reach of his creditors, thereby to deprive them of their just dues, the sale was void as to creditors; that though *Gideon* might have secured his debt, he could not make use of it as a pretence to enable Micajah to withdraw his property from the reach of his creditors; and if any portion of the consideration was so paid, the sale was fraudulent and void as to creditors. The court instructed the jury, among other

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things, that the deed of Micajah to *Gideon* was good, unless defeated by the act of the parties; that there were two kinds of sales fraudulent as to creditors; one where no valuable consideration was paid; the other where a valuable consideration was paid, but done with intent to defraud the creditors of the vendor, and that this intent must exist in the vendor and vendee both at the time of sale; that though Micajah might have sold the farm with a corrupt and fraudulent intent to cheat and defraud his creditors, yet if *Gideon* did not know it, and purchase with a like corrupt and fraudulent intent, it would not be fraudulent in him; that if the jury found that Micajah sold to *Gideon* with such corrupt and fraudulent intent, that *Gideon*, knowing it, entered into it, and purchased, and paid the whole, or any part, of the consideration, with such intent, the sale, as to creditors, was fraudulent and void; that if *Gideon* found it necessary to take the farm to save himself from the Butler note, and to pay the \$100 to Micajah, and the debt to his father and sister, the sale would not be fraudulent as to him, for it was laudable for him to help his brother, who was embarrassed, to redeem the land, and lawful for him to indemnify himself in the Butler note by purchase of the farm, to give the preference to the just debts in the family, if it was Micajah's request, and, so far as he was influenced by such motives, or others of a like nature, the sale was not thereby fraudulent: but if, as stated before, *Gideon*, knowing that Micajah sold with a corrupt and fraudulent intent to cheat and defraud his creditors out of the avails of the farm, or any part thereof, and *Gideon* purchased with a like corrupt and fraudulent intent, and paid the whole, or any part of such purchase, with intent to assist his brother in the fraud, the sale was fraudulent and void as to creditors, and the plaintiff must recover. But if *Gideon* supposed that Micajah intended to pay the purchase money to his creditors, and did not intend to withdraw himself or his effects from the reach of his creditors, the purchase would not be fraudulent. The jury found a verdict for the defendants.

The plaintiff excepted to the decision of the court before mentioned, and to the charge to the jury, and a bill of exceptions was allowed, stating the foregoing facts; whereupon the cause was brought up to this Court.

*Mr. Fletcher, for the plaintiff.*—The plaintiff contends that a new trial ought to be granted, 1. Because the court misdirected the jury in the law of the case. The statute declares *all fraudu-*

*lent and deceitful deeds, &c., made with intent to void any right, debt or duty of any person, &c., to be utterly void, &c.* This language is plain and explicit. The end and scope of the statute cannot be misapprehended. The only ingredient necessary to make the deed void is that it was made with *intent* to avoid the right of another. This was the issue put to the jury. This was the fact submitted to their inquiry. This was the point on which the court were called upon for instructions. In this case it was the duty of the court to have given the jury an exposition of this statute; to have given them instructions upon the law arising out of the facts, and to have particularly pointed out to them what testimony would amount to the proof necessary for the plaintiff to recover—what would amount to a *bona fide* sale, and what to a fraudulent one, within the true intent and meaning of the statute.—1 *Aikens' Rep.* 120, *Durkee vs. Mahoney*. The charge of the court was involved in obscurity, and had a manifest tendency to mislead the jury. Not only that, but they were, as is contended, misdirected as to the law, and instructed to find facts (if they found for the plaintiff) not required nor contemplated by the statute. The language of the charge is most extraordinary. It is redundant with a most formidable array of hard words and imposing terms. The statute is silent as to any “*corrupt and fraudulent intent* of the vendor and vendee.” But this sentence is introduced no less than seven times in the charge. The statute does not require that the deed should be executed with a *corrupt and fraudulent intent* of the vendor and the vendee, but only with intent to avoid any right of any person. The true intent and meaning of the statute is, that all deeds made with intent to avoid any right of any person, are fraudulent and void. Fraud in the statute is predicated of the deed, and of the deed only, not of the parties to it. But the court instructed the jury to refer the fraud to the vendor and vendee, and that, if they did not both act fraudulently and corruptly, with an intent to cheat and defraud the creditors of the vendor, the deed would not be fraudulent and void as to the plaintiff. But the fraud contemplated by the statute is an inference of law, not a fact for the plaintiff to prove, and for the jury to find. It depended upon the *intent* with which the deed was made; and it was the duty of the court to have instructed the jury, that if they found the deed was made with intent to avoid the right of any person whatever, the law pronounced it fraudulent and void; and also particularly to have pointed out to the jury what testimony would constitute the proper evidence of such intention, and what proof of

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facts would entitle the plaintiff to a verdict. But upon this part of the case the court instructed the jury, "that, though the vendor might have sold the farm with a corrupt and fraudulent intent to cheat and defraud his creditors, yet if the vendee did not *know* it at the time, and purchase with a like corrupt and fraudulent intent, the deed was not fraudulent : also, if the vendee supposed that the vendor intended to pay the whole purchase money to his creditors, and did not intend to withdraw himself or his effects from their reach, the deed was not fraudulent. Where is such language or doctrine to be found ? Not in the statute, nor in the law. The statute is silent as to the corrupt and fraudulent intent of the parties to cheat and defraud creditors ; as to the vendee's knowledge of the vendor's intent being corrupt and fraudulent, and that the vendee must have this knowledge at the time of sale. But the court so instructed the jury, as being the law governing the case ; and so far as this doctrine is not within the intent and scope of the statute, there is error in the charge. Had the charge stopped here, it would have been less exceptionable. But the jury are instructed, if the vendee supposed that the vendor *intended* to pay the purchase money to his creditors, and not to withdraw himself or his effects, the sale was not fraudulent. Here the court make the validity of the deed depend upon the supposition of the vendee as to the appropriation by the vendor of the avails paid, and not upon the intent with which the sale was had, as declared by statute. The act is done by the vendee which enables the vendor to avoid the right of the plaintiff ; and be the consideration adequate, or inadequate, if vendee *supposes* that it will be paid to the creditors, the sale, according to the charge, is valid. When did the question of a sale being fraudulent or not, (passing by the consideration of the intent of the parties to it,) depend upon the supposition of the *particeps criminis* ? What then is the instruction which the court ought to have given, and what the language of the statute ? It is this : that if the vendor executed the deed to the vendee with intent to avoid the right of any one, and the vendee knew it, or participated in it, the deed was fraudulent and void. The court ought to have directed the jury to such facts, if any were in proof, as would have been evidence of the intention of the vendor, and of the knowledge or participation of the vendee ; what was evidence of the deed having been made with intent to avoid the right or duty contemplated by the statute, and what was not. This duty the law imposed upon the court, and, inasmuch as it has not been performed, the plaintiff contends for a new trial.

But the plaintiff contends that there was error in the admission of the deposition of Joseph M. Morrill. The deposition was not taken at the time and place set in the citation; but the magistrate adjourned the taking one week, and then took it, without sending out a new citation. The statute respecting taking depositions is in derogation of the common law, and, therefore, to be strictly pursued. This statute designates certain magistrates to take depositions, prescribing certain forms to be pursued, but authorizes no adjournment. The taking the deposition is a ministerial, not a judicial, act. There is no court. Then there is no power incidental that will warrant an adjournment.—1 *Peter's Con. Rep.* 535, *Buddicum vs. Hicke*; 1 *Aikens' Rep.* 268.

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*Wm. Matlocks*, contended for the defendant, that *Ch. 7. s. 81*, (*Slade's Ed. of stat.*) requires a written citation to be served, which, in this case, was done; but this section does not say, nor is it implied, that it must be done on an adjournment. There is, and must, from the nature of the case, be implied a power to adjourn: it is a power incident to all courts, and all acting ministerially; else injustice, needless expense, and absurdity, will ensue. Suppose *Edgell* present the first time; how idle and ridiculous to have cited him again. And is there any difference between being there in person, or by his agent? See act of 1830, *p. 5*, as to a justice giving the oath to poor debtors. No express authority is given to adjourn, for the creditor to prove property in the debtor; but no one doubts its being implied. The administering that oath is no more a judicial act, than taking a deposition: both alike are special duties appended to the office. But if any doubt exists under the act of 1797, the act of 1827, *p. 5*, removes all doubts by verbal notice being good in the first instance, and still more so on adjournment. It does not say *personal*, but *verbal*. At common law and English practice, in most cases, except service of writs, notice to the attorney only is good; but here it was to the party and attorney. Plaintiff objects with a very ill grace to the notice coming through his own agent. As to the charge of the county court; 1st. it was agreeable to the plaintiff's request, and not inconsistent with it; and 2d. the charge is in substance according to law: it is like the charge in the case *Bridge vs. Eggleston*, 14 *Mass.* 245. There must be fraud proved in the grantor, and knowledge or participation by grantee.—12 *Mass.* 456. So the sale must be *bona fide*, as well as for a good consideration.

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—1 *Swift's Dig.* 266-7 ; 8 *John. Rep.* 446 ; *Cowper*, 434.  
If the sale is not fraudulent at the time, it can not be afterwards.—  
*Cowper*, 710-11 ; 12 *Mass.* 110 ; *Swift*, 270, 273.

BAYLIES, J., *delivered the opinion of the Court.*—As to Morrill's deposition, it appears that the justice of the peace, after duly notifying the plaintiff to attend at a certain time and place to the taking of this deposition, did, on account of the sickness of the witness, *adjourn* the taking to another time, at the same place, of which adjournment the plaintiff's agent had *verbal* notice given him by the justice, and this notice was communicated to the plaintiff, as set forth in the bill of exceptions. We are inclined to the opinion, that the justice of the peace had power to *adjourn* the taking of the deposition, and *verbal* notice, given to the adverse party of the adjournment, was sufficient. And we also decide, that Micajah M. Lowell, having been discharged from the covenants in his deed, was rightly admitted as a witness to testify on the part of the defendant. But when we examine the charge of the county court to the jury, we find they were instructed, "that there were two kinds of sales fraudulent as to creditors ; one where no valuable consideration was paid—the other where a valuable consideration was paid, *but done with intent to defraud creditors of the vendor, and that this intent must exist in the vendor and vendee both at the time of sale ;*—that though Micajah might have sold the farm, *with a corrupt and fraudulent intent to cheat and defraud his creditors ;* yet if Gideon did not know it, and purchased *with a like corrupt and fraudulent intent, it would not be fraudulent in him.* It is abundantly insisted upon throughout the charge, that the vendor and vendee must be actuated by *like* motives to cheat and defraud the creditors of the vendor, or the sale cannot be fraudulent as it respects the vendee. I cannot approve of this doctrine. It is however true, that if the vendee was a *bona fide* purchaser for a valuable consideration, without notice of any fraud in the vendor, the creditors of the vendor could not avoid the contract, as it respects the vendee. But if the vendee at the time had *knowledge*, that the vendor sold his farm to defraud his creditors, it would make the conveyance void in his hands, as to such creditors, although he had no wish to defraud them ; but purchased, because he considered the farm was *cheap*, and this was the *only* motive, that induced him to purchase. Hence I conclude, that the motives and intents of the



vendor and vendee, may be different, and the conveyance, as it respects the vendee, will be void.

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In the case of *Bridge vs. Eggleston*, 14 Mass. 250, the court say, "It will be well to establish some precise rules, which may make this branch of litigation less troublesome, than it has hitherto been. Now as the creditor, in such cases, is obliged to prove actual fraud in the grantor, and a participation in, or *knowledge* of, it in the grantee, we think these two branches of his case will admit of the application of evidence to the two parties, which, although apparently inconsistent with, is by no means repugnant to, the common rules of evidence."

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"To prove fraud in the grantor, his conduct and his declarations before the conveyance may be the best, and often the only evidence, within the power of the creditor. He at that time is not interested, nor can it be his design to injure those, with whom he may afterwards contract. If fraud is thus proved upon him, then the knowledge of it on the part of the grantee is to be proved; which may be done by showing a trifling consideration, or none at all; by acts inconsistent with the *bona fide* ownership of the property; by confessions of the nature of his bargain; or by other circumstances, tending to show a *knowledge* of the designs of the grantor. Without this latter evidence, the former, as to the designs of the grantor, is wholly ineffectual to defeat the purchase; and a jury, under the direction of the court, will always be able to discriminate; so that the purchaser will not be injured by the declarations of the grantor, unless he be proved to have been *privy* to his fraudulent designs."

Ch. 32, s. 7, (*Slade's ed.*) says, "And every of the parties to such fraudulent and deceitful conveyance of goods or chattels, bond, bill, note, contract, agreement, suit, judgement, or execution, or any conveyance of houses, lands, tenements, or hereditaments, made with like fraudulent intent, who, *being privy thereto*, shall justify the same to be made, had or executed, *bona fide*, and upon good consideration," &c.

The word, *privy*, as defined by *Webster*, sometimes means, "admitted to the participation of knowledge with another of a secret transaction." This is nearly the sense in which the word is used in the statute: it means a *knowledge* of a secret fraudulent transaction, in which he, who has the *knowledge*, was a party.

The judgement of the county court is reversed, and a new trial granted.



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**JOSHUA SAWYER vs. JAMES LITTLE.**

A lease for 800 years to a *feme covert* and her particular heirs, such, too, as were then in being, is an incumbrance on the estate.

When husband and wife join in a deed of conveyance of land, with covenants of seizin, &c., the wife is not liable to a suit upon such covenants, but the husband, it seems, may be sued as if it were his sole deed.

This was an action of *covenant*, which came up from the county court on the following case agreed to by the parties :

" In this cause, it is agreed by the parties, that, on the 16th day of April, 1824, *James Little*, the defendant, was the owner in fee simple of the land in question, and was in possession of said premises ; and, on the said 16th day of April, 1824, conveyed said premises to Thomas Waterman, of Johnson, by deed of quitclaim, or warranty and seizin ; that, on the said 16th day of April, 1824, the said Waterman leased to *Rosetta Little*, wife of *James Little*, her executors, administrators and assigns, the whole of said premises for and during the term of eight hundred years from the date of said lease, to be completed and ended ; and directing the premises, at the decease of *Rosetta Little*, to pass to the legal heirs of *James Little* by the said *Rosetta*, and to *Diantha Safford*, wife of Joseph W. Safford, and daughter of *James Little* (by another wife ; ) to them equally, and to their heirs, executors, administrators and assigns, during said term ; they paying therefor to Waterman, his heirs and assigns, an annual rent of twelve and a half cents ; and that they also, to bear and pay the taxes, &c. during said term ; that, on the 17th day of January, 1825, and long after the above lease, Thomas Waterman reconveyed to *James Little*, by deed of quitclaim, the said premises ; that, on the 12th day of June, 1827, *James Little* and *Rosetta Little*, then in possession, conveyed the premises to the plaintiff, by deed of warranty, covenanting that they were at, and until, the ensealing of said deed, well seized of the premises in fee simple, and that they had good right and lawful authority to bargain and sell the same, in manner and form as mentioned in the deed ; and that they were free, and clear of all incumbrances ; that all the deeds of conveyance referred to were executed with the necessary formalities, and are agreed to be valid deeds, so far as respects their execution. It is agreed, that *Sawyer* had heard, at the time of the execution of the deed by *James Little* and *Rosetta Little* to him, that some kind of lease had been executed to the heirs of *James* and *Rosetta Little*, and *Diantha Safford*, but had never seen the lease ; and, at the time of the conveyance to *Sawyer*, said lease was not considered or believed to be valid. It is agreed that the original deed from *James* and *Rosetta Little* to *Sawyer*, with copies of all conveyances referred to in this case, are to be made a part of it. It is also agreed, that, at the date of the lease from Thomas Waterman, *Diantha Safford* was and still is capable of taking said estate ; also

that there are and were, at the time of the conveyance to *Sawyer*, joint heirs of *James* and *Rosetta Little*, as contemplated by said lease, all capable of taking said estate, if such be the operation of said lease. Now, if, upon the whole case, the court should be of opinion, that there is a breach of covenant upon any of the covenants contained in the deed to the plaintiff, and that said estate was incumbered, when sold to *Sawyer*, judgement is to be entered for the plaintiff, and damages to be assessed by the court according to law."

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On this statement of facts the county court rendered a judgement for the plaintiff, and the defendant appealed to this Court.

The case having been elaborately argued by counsel, the opinion of the Court was pronounced by,

HUTCHINSON, C. J.—When this cause first came up to this Court, it stood against the said *James Little*, and his wife, *Rosetta Little*, jointly. After argument, upon the same statement of facts now before us, we decided, that she was not liable upon those covenants, made during her coverture; but no decision was made upon the part of the case then remaining, and now presented for our decision. The plaintiff moved to amend his declaration by erasing the name of said *Rosetta*, and letting it stand against said *James* alone, as it now is. This was granted, upon terms, I believe, which were complied with. In the present argument, the execution of this deed by said *Rosetta*, jointly with her husband, during her coverture, is treated as a nullity, so far as relates to her liability on these covenants; or so far as relates to the liability of said *James* to be sued alone, without taking notice of the said *Rosetta*, as being a cosigner with said *James*.

Therefore, the only question now presented is, whether the lease from Waterman, under all the circumstances of the case, creates a defect of title in *James*, when he conveyed to the plaintiff; or, whether it was then an incumbrance upon the land, so as to form a breach of these covenants in the defendant's deed to the plaintiff. It appears in the case, that Waterman, having received from this defendant an absolute title to the land in question, gave a lease of the same for eight hundred years to the said *Rosetta*, then the wife of the said *James*, her executors, administrators and assigns, they paying twelve and half cents yearly rent. Had the lease stopped here, it would have created, according to the authorities cited, a chattel interest in said *Rosetta*, which would have been under the control, and at the disposal, of her executors or administrators after her decease, or might have been disposed

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of by her during her life, and, of course, would not have formed an incumbrance upon the land, to operate against the conveyance made to the plaintiff by her and her husband. But the lease goes on, not in any form, found in the books, but in a sort of historical manner, and provides, or rather recites, that, at the decease of the said *Rosetta*, the said premises are to pass to the legal heirs of the said *James Little*, by the said *Rosetta*, and to Diantha Safford, wife of Joseph W. Safford, and daughter of the said *James Little*, by a former wife ; to them equally, and to their heirs, executors, administrators and assigns, during said term ; they paying therefor, to the said Waterman his heirs and assigns, an annual rent of twelve and a half cents : they were also to bear and pay the taxes &c., on said premises, during said term. The case also states, that said *Rosetta* was then, and now is, capable of taking and holding real estate, and that there then were, and still are, in being, such joint heirs of said *James* and *Rosetta*, as named in said lease.

There can be no doubt but that this arrangement with Waterman was intended as a family settlement of this farm. *James* deeds to Waterman, to enable him to convey to *Rosetta*, the wife of said *James*, and to certain heirs named. He conveys accordingly by the lease referred to. He then quits to said *James* all his, Waterman's, right to said premises. This operates to make said *James* landlord to receive the annual rent. He then was in possession, in right of his wife under the lease, and as landlord under his deed.

Now, in ascertaining what should be the true construction of this lease, we derive no benefit from the location of the various expressions ; because it follows no form known in law. All we can do is, to compare all its provisions together, and see how they best stand together, and hence discover what were those intentions of the parties, to which the law will give sanction. In this mode of investigation, we are led to the conclusion, that the expression, " the heirs of said *James* by said *Rosetta*, and the said Diantha Safford," should be treated as a term of purchase, they all being then and still in existence. The lease will then operate to give *Rosetta* a life lease, and, upon her decease, the said Diantha Safford, if living, otherwise, her heirs, and those children of said *James* and *Rosetta*, jointly, who would be their legal, joint heirs, if said *James* were also dead. This was, therefore, an outstanding title, which *James* and *Rosetta* could not convey to the plaintiff. They could convey all her right, that is her life estate,

and no more. The use for the residue of the eight hundred years, after the decease of the said *Rosetta*, is a title against which the plaintiff cannot hold. This may be considered a breach, either of the covenant of seizin, or covenant against incumbrances. By a reference to the plaintiff's deed, a copy of which is furnished us, we perceive, that the covenant of seizin is not a naked covenant of seizin, but is also a covenant that the seizin is in fee simple, accompanied with a good right and lawful authority to bargain and sell said premises in the manner in said deed written. Now, upon the construction we have given the lease, they were not seized in fee simple, but for the life of said *Rosetta*, only; and they had no right to bargain and sell said premises, but only to sell a life estate in them. This outstanding title may, also, be considered as an incumbrance; because the plaintiff would be obliged to purchase it in, or he could never hold the premises under his deed, after the decease of the said *Rosetta*. Judgement must be entered for the plaintiff upon this agreed case; but we cannot assess the damages, as the parties have contemplated in their agreement. There can be no possible rule for assessing the damages, that will be sure to do justice to the parties. There ought to be an agreement, if possible, to rescind this last contract, and the plaintiff convey back his title on proper terms, receiving back what he has ever paid, and his costs and interest. The parties so little thought of the state of things into which they have got themselves, possibly a court of chancery would compel a rescinding of the contract, on some reasonable terms. The best justice may be done by the agreement of the parties. As the action now stands before us as a court of law, it must pass to the county court for the assessment of damages.

*Sawyer & Fletcher*, for plaintiff.

*Willard & Young*, for defendant.

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**JOHN SKINNER, JOHN HURD and WILLIAM HURD vs. JOHN McDANIEL.**

A plaintiff in ejectment must show the defendant in actual possession of the premises demanded at the time the suit was commenced, or he cannot recover.

Certain defendants in an action of ejectment residing in another state at the time the suit was commenced, no service was made on them by attachment or otherwise, and they not having had notice of its pendency, the court ordered notice to be given by publication in a news-paper, agreeably to the requisitions of the statute respecting persons absent from the state, at the time a suit is commenced against them, and have no notice of it ;—the defendants not appearing in pursuance of said notice, judgement was rendered against them by default. On a writ of review afterwards brought by these defendants, it was held that the judgement was void for want of jurisdiction of the court, and that they had no occasion to bring a writ of review in order to avoid the judgement.

If neither person nor property of one, against whom a suit is brought, can be found in this state whereon to serve process, the court has no jurisdiction over him.

This was a writ of *review*, brought in pursuance of the statute, *ch. 7, s. 55*, to review an action of ejectment which had been brought by *McDaniel* against *Skinner*, and *John* and *William Hurd*, and others. The officer who served the writ returned that he had served it on three of the defendants, who resided in the county of Orleans, but made no mention of *Skinner* and the two *Hurds*, who resided in Massachusetts, nor of Hadley, another defendant, who resided in the state of New-York. But the action was entered in court against all the defendants. The following record shows the proceedings in the county court :

|                         |                         |
|-------------------------|-------------------------|
| “ John McDaniel         | } Orleans County Court, |
| vs.                     |                         |
| “ Jeffrey Watson et al. |                         |
|                         | February term, 1825.    |

“ Luther Kidder, Jeffry Watson and Hezekiah Davis, of Hyde-  
park, in the county of Orleans, Jacob P. Hadley, of Constable, in  
the state of New-York, and *John Skinner*, *John Hurd* and *Wil-  
liam Hurd*, of Charleston in the state of Massachusetts, were at-  
tached to answer unto *John McDaniel*, of said Hyde-  
park, in a plea that to the plaintiff, the defendants render the seizin and pea-  
ceable possession of a certain tract or parcel of land with the  
appurtenances thereto belonging, lying and being in said town of  
Hydepark and described as follows, to wit : seventy-seven acres  
and fifty two rods of the east side of number thirteen, on the first  
division, drawn to the right of Roger Enos, jr. and having a dwel-  
ling house and two barns thereon, divided by a line running  
through said lot parallel with the west line thereof ; also twenty  
acres and thirty-eight rods being the west side, and south half of  
lot number sixteen, in the first division in said town, known by the  
name of the Lamphier farm ; also one quarter of an acre of land  
on the main road leading from Wolcott through said Hyde-  
park to Johnson, and being near the mansion of the said *John McDaniel*

in said town of Hydepark, with a dwelling house thereon. See writ on file. This cause was entered February term, 1824, and continued, *Hadley, Skinner and Hurds*, being out of the state. September term, 1824, it was continued under the usual order of notice by publication in a newspaper; and now at the present term, order of notice having been complied with, the defendants, though three times called in open court, do not appear, but hereof make default. Whereupon, the court on the showing of the plaintiff, considered and adjudged that the plaintiff recover of the defendants the quiet and peaceable possession of the premises demanded, one cent damages and his costs, allowed at thirty dollars and thirty six cents, and that writ for possession and execution may issue. Writ issued 8th March, 1825; returned 3d May, 1825.

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Attest, *Ira H. Allen, Clerk.*"

On the trial of the action of ejectment in pursuance of said writ of review, the issue being joined to the country, the said *John McDaniel* gave in evidence a mortgage deed of the land in question from Jacob P. Hadley, dated 10th January, 1821, to *McDaniel*, and a decree of foreclosure of the equity of redemption on said mortgage, March term, 1827. The said *Skinner* and *Hurds* gave in evidence to the jury the levy of a certain execution in their favor against the said Jacob P. Hadley, on the land in question, on the 2d August, 1820, and records made of said execution, and officer's return thereon, on the 3d day of August, 1820, in the proper offices for recording the same; but there was no evidence that *Skinner* and *Hurds* took actual possession of said land under their execution and levy.

The court instructed the jury, that *Skinner* and the *Hurds* were not liable to *McDaniel* in the present action without some further proof of their being in possession of the premises, either by themselves, or some tenant, than what is above recited. The jury found a verdict for *McDaniel* against the other defendants; but against *McDaniel* in favor of *Skinner* and *Hurds*, on the ground that they were not in possession of the premises, when the action was commenced. To which charge of the court *McDaniel* excepted, and the exception was allowed. The cause now came before this Court on a motion for a new trial, founded on an alledged misdirection of the court to the jury.

The opinion of the Court was delivered by

BAYLIES, J.—There is no doubt the court below instructed the jury correctly. It has long been established, that the plaintiff, in ejectment must show the defendants in possession of the land

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demand, at the commencement of his action : showing that the defendants have some sort of claim to the land is not sufficient. But when we examine the record of proceedings in the action of ejectment, and the judgement rendered on default, we cannot discover the necessity of a *writ of review* being brought by *Skinner* and the two *Hurds* to reverse that judgement. It appears by the writ of ejectment, that *Skinner* and the two *Hurds* resided in Charleston, in Massachusetts, and were citizens of that state ; and they had no property here, and no service of the writ was made upon them. But their names were entered upon the docket of the court, as defendants in the action. It is a question, whether the court, having no jurisdiction of the action, as it respected *Skinner* and *Hurds*, for want of service of the writ upon them, could acquire jurisdiction by making an order of notice to them to be published in the news-paper, as was done in this case ? The statute, (*ch. 7, s. 55,*) says, “ That if the party against whom any “ suit shall be brought, were absent from the state, at the time “ of commencing such suit, and shall not return within the same “ before the time of trial, the court, in which such suit is brought, “ shall continue the action to the next term of said court, (unless “ the plaintiff shall make it appear to the satisfaction of the court, “ that the defendant had notice of *the service* of such process, a “ sufficient time before the return thereof to have appeared at said “ court, and have had a trial.) And it is hereby made the duty “ of the plaintiff to cause personal notice of such suit, and contin- “ uance, to be given to the defendant, twenty days previous to “ the next term of said court. And unless it shall appear to the “ court, that the defendant has been notified, the court shall fur- “ ther continue said action, and order further notice to be given, “ by directing a publication thereof to be made in some public “ news-paper, at their discretion.”

The writ must be served on the absent defendant in some one of the ways pointed out by statute. If the writ be not served, the court can have no jurisdiction of the action—not even to continue it, for the plaintiff to give the defendant notice. But if the writ be served, the court may continue the action from term to term, and order notice to be published in a news-paper. So a citizen of another state, whose property is attached in this state, may be notified of the pendency of the action agreeably to the above act. But if neither the person, nor property of a citizen of another state, can be found in this state, whereon to serve process, the courts of this state can have no jurisdiction over him. Neither



the persons, nor property of *Skinner*, and the two *Hurds*, were found, whereon to serve the writ of ejectment, and no service was made on them. The court then could have no jurisdiction of the action, as it respected them; nor could the court acquire jurisdiction by ordering notice to be published in a news-paper; because the writ not being served, was not a case for notice within the above statute. If after such notice, the court proceeded and rendered judgement against *Skinner* and the two *Hurds*, on their default, such judgement must be utterly void for want of jurisdiction. It could not be necessary for *Skinner* and *Hurds* to bring a writ of review to avoid this void judgement; but as they have brought such writ, and succeeded in it, the

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Judgement of the county court  
is affirmed with additional costs.

*Sawyer & Fletcher*, for reviewee.

*Paddock & Young*, for reviewers.



JOHN SKINNER, JOHN HURD and WM. HURD vs. JEFFRY WATSON and JOHN MCDANIEL.

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When an execution is levied on land the record in the town clerk's office may be made from a copy of such execution, and officer's return thereon; and such record will be sufficient, if it substantially agree with the original.

If there be an error or mistake in recording the levy of an execution, which does not tend to the injury of any person, and the record is sufficient to answer all the purposes for which it was made, the levy is not thereby void.

This was an action of *ejectment* for one fourth of an acre of land being a part of lot no. 13 in the town of Hydepark, and drawn to the original right of Roger Enos jr. being the first division of lots in said town. Plea *not guilty*. In addition to the evidence, which the plaintiffs had given to the jury on the trial, they offered a copy of a judgement of the county court for the county of Orleans, in June term, 1820, in favor of the plaintiffs against Jacob P. Hadley for damages and costs, and an execution upon said judgement, and levy upon the land in question on the 2d day of August, 1820. And of this execution and levy the plaintiffs produced two sets of copies; one set showed the execution and officer's return thereon to be duly recorded in the records of said county court by their clerk, on the 3d of August, 1820; and also showed that on the same day a copy of the execution, and officer's return thereon, was recorded by the town clerk in the town records of Hydepark, where the lands lie. In this last record

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there was a *mistake* : the appraisers, as it appears in the officer's return, appraised land to the amount of \$1044,34 in satisfaction of the execution, and legal costs thereon, as stated in the bill annexed. This was correct. But in the record from the town clerk's office it was stated, that the appraisers appraised land to the amount of \$1275,52 in full satisfaction of the same execution, and bill annexed. The amount of the execution and bill annexed were alike in both records, and the insertion of the \$1275,52 was evidently a *mistake*. The defendants objected to this record going to the jury ; because it purported to be a record of a *copy* of the execution, and officer's return, and not a record of the execution itself and officer's return, and because of the above *mistake* ; and the court excluded the evidence ; to which decision the plaintiff excepted.

The second set of copies showed a recording of the execution and officer's return in both said offices in September and December, 1822 : but this was not relied on.

The defendants then offered in evidence to the jury, a mortgage deed of the land in question from said Hadley to *McDaniel*, dated January 10, 1821, and evidence to show, that the equity of redemption on said mortgage was foreclosed in 1827. The defendants also offered in evidence the records of a vendue title of said land obtained by *McDaniel* on a road tax, granted by the legislature in 1822. They also offered in evidence a record of a judgement obtained by default in an action of ejectment in favor of *McDaniel* against the plaintiffs and others, for the land in question, before the county court in Orleans county, February term 1825.

The plaintiffs objected to the admission of all the above evidence so offered by the defendants ; but the court admitted it ; to which the plaintiffs excepted. The case now came before this Court on the above exceptions.

The plaintiffs contended, by their attornies, *Paddock* and *Young*, that they claimed the land by levy of execution on the 2d of August, 1820, recorded in the town and county clerk's office, on the day following ; but the record in the town-clerk's office was made from an attested copy of the execution and return thereon, certified by the officer. The copies from this record were objected to in the court below, for the reason, that a legal record could not be made from the officer's certified copy. Upon turning to the statute we find the provisions upon the subject

of recording are, " that all executions extended and levied upon  
 " any lands, tenements or houses as aforesaid, together with the  
 " officer's return thereon, being recorded in the records of the  
 " town in which such houses, &c. are situate, and also returned in-  
 " to the office of the clerk of the court, or justice of the peace,  
 " from which such execution issued, and there recorded, shall as,  
 " against such debtor, his heirs and assigns, make a good title to  
 " the party for whom such estate was taken, &c." The simple  
 plain construction of which is, that whenever a creditor shall ex-  
 tend and levy his execution upon the real estate of his debtor, he  
 shall cause the execution and officer's return to be transcribed  
 upon the records of the town where such estate lies, and also upon  
 the records of the court from whence the execution issued. If  
 this be the most correct and rational construction, which can be  
 given to the statute, the plaintiffs (saying nothing at present of the  
 mistake) have complied with both the letter and spirit of the law.  
 The respective clerks are to make the records, and the law will  
 be equally satisfied, be it made with red ink, or black; neither  
 does it point out the manner the clerks shall make it, whether it  
 shall be put in scrip, or Roman characters, or in both, having it a  
*fac-simile* of the execution—whether they shall first read and then  
 write from recollection—whether the officer shall read and the  
 clerk write, or the clerk read, and the officer write, or the  
 officer do both. Would not the letter and spirit of the law be  
 complied with in the one case, or the other, provided the exe-  
 cution and return were fairly transcribed upon the record?  
 Again, when this record was made there was no statute provision  
 authorizing a select man to perform the duties of a town clerk in  
 any case; and supposing an officer on arriving at the office  
 should find the clerk to be absent, and would not return for  
 weeks, and, being under the necessity of returning the execution  
 for an *alias* to extend and levy on other lands, should make out  
 and certify a true copy of his execution and return, and the clerk  
 had copied the same upon the records, which proved to be an ex-  
 act transcript of the original: we ask the court, whether they could  
 reject the copies of such a record, for the reason that the record  
 itself was made from the officer's copy? If there ever was a peri-  
 od, when a doubt could reasonably be entertained upon the sub-  
 ject, that doubt was removed by the act of 1798, called the gener-  
 al fee bill, which gave to an officer fifty cents, *for a copy of an*  
*execution extended on land's, and the return thereof to the officer*  
*for record.* If this copy is to be recorded, then the execution

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need not be, in the town clerk's office. We are then met with the objection that there is a variance between the execution and return, and the record in the town clerk's office. It is contended by the defendants, that as the record is an exact transcript of the return, that, therefore, the execution and return had not been recorded in the town clerk's office as the law directs : but we answer, the execution was recorded within the intent of the law ; for it gave sufficient notice to the public, that the land had an execution levied upon it, and it gave notice to the full amount of the incumbrance, and even \$232,18 more.

*Sawyer and Fletcher, for defendants.*

The opinion of the Court was delivered by

BAYLIES, J.—We are called upon to decide whether this record of the *copy* of the execution extended on lands, and officer's return thereon, made in the records of the town where the lands lie, on the 3d of August, 1820, is sufficient in law. In deciding this point I shall take a concise view of our registry acts, and see whether they have ever permitted a *copy* of a deed, or a *copy* of an execution, extended on lands, to be recorded in the town records, instead of recording the deed, or execution itself.

The act of February, 1779, says, "that henceforth, all deeds or conveyances of any houses or lands, within this state, signed and sealed by the parties granting the same, having good and lawful right or authority thereto, and attested by two or more witnesses, and acknowledged by such grantor or grantors, before an assistant or justice of the peace, and recorded at length in the town records where such houses and lands do lie, shall be valid to pass without any other act or ceremony in law whatsoever."

"That the town clerks in the several towns in this state, shall fairly enter, and record at length in their records, all deeds, conveyances, and mortgages of lands, tenements, rents or other hereditaments, lying and being within the town where such clerk's records are kept, within this state—made, executed, and acknowledged, or received in manner aforesaid, which shall be brought to him to record ; and shall on receipt thereof in his office, note thereon the day, month and year when he received the same, and the record shall bear date accordingly."—(*State papers*, 336–7. The act of March 8, 1787, says, "that all deeds or conveyances of any houses or lands, within this state, signed, sealed, and delivered, by the parties granting the same, having good and lawful

authority; attested by two or more witnesses, and acknowledged by such grantor or grantors before a justice of the peace, and recorded at length in the town clerk's records, where such houses or lands do lie, shall be valid to pass the same without any other act or ceremony in the law whatsoever."

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"That the town clerks, in the several towns in this state, shall fairly enter and record at large in their records, all deeds and conveyances of lands, tenements and hereditaments—and shall, on receipt thereof in their offices, note thereon the time when they received the same, and shall date the record and filing thereof accordingly."—(*Haswell's ed. Stat. p. 32.*)

The Act of March 6, 1797, says, "that all deeds and other conveyances of any lands, tenements or hereditaments, lying in this state, signed and sealed by the party granting the same, having good and lawful authority thereunto, and signed by two or more witnesses, and acknowledged, by such grantor or grantors, before a justice of the peace, and recorded, at length, in the clerk's office of the town in which such lands tenements and hereditaments lie, shall be valid to pass the same, without any other act or ceremony in law whatever."—(*Slade's ed. 167.*)

*Act of 28th February, 1797* :—"And it is hereby made the duty of the town clerk or register, truly to record all deeds and conveyances of any houses, lands or tenements, and all writs and executions, when by law it becomes necessary."—(*Slade's ed. 415.*)

The above statutes relate to deeds, and the following to executions. The act of 1779, says, "All executions duly served upon any houses and lands, being returned into the clerk's office of the court out of which the same issued, and there recorded; as also a copy thereof lodged in the town clerk's office in the town, where such houses or lands lie, (which said clerk shall enter in the town book of records, taking the same fee as allowed for recording deeds,) shall make a good title for the party for whom they shall be taken, his heirs and assigns forever."—(*Vt. state papers, 363.*)

The act of 1787, says, "And all executions duly served upon any such houses and lands, with the return of the officer thereon, being recorded in the records in the town wherein such houses and lands are situate, or in the office where deeds respecting such lands ought by law to be recorded, and also returned into the office of the clerk of the court or justice, whence the same issued, and there recorded, shall, as against the debtor, his heirs and assigns, make a good title to the party for whom they shall be taken, his heirs and assigns forever."

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"And it shall be the duty of the officer to cause the execution with his endorsement thereon to be entered on the town records, or in the proper office, as aforesaid, before he return the same ; and the officer shall have two shillings for causing the same to be recorded, with additional fees for his travel.—(*Haswell's ed.* 65.)

The act of 1797, says, " And all executions extended and levied upon any houses, lands, or tenements, as aforesaid, with the return of the officer thereon, *being recorded* in the records of lands of the town in which such houses, lands or tenements are situate, or in the office wherein deeds respecting the same are required by law to be recorded, and also returned into the office of the clerk of the court, or justice of the peace, from which such execution issued, and there recorded, shall, as against such debtor, his heirs and assigns, make a good title to the party for whom such estate was taken, his heirs and assigns for ever."—(*Ch. 26, s. 3, Slade's ed.* 210.)

The general fee bill of 1798, under the head of sheriff's fees, has this item : " Copy of an execution extended on lands, and the return thereof to the office for record, 0,50."

The statutes before 1797 are repealed, and are referred to for the better ascertaining the meaning of the legislature in passing the acts of 1797 and 1798. It is a rule that every statute should be construed according to the intention of the legislature, and where there is doubt, all other statutes made in *pari materia*, whether repealed or not, should be considered. In taking this view, I am satisfied, that the intention of the legislature, in their acts directing the recording of deeds, was, to have the town-clerk make the record from the deed itself, and not from a copy. But in considering the acts, which direct the recording of executions extended on lands, I am inclined to believe that the record in the town clerk's office may be made from a copy of such execution and officer's return thereon. The act of 1779, says, " A copy of the execution shall be left in the town clerk's office, which copy said clerk shall enter in the town book of records." Here the practice of recording a *copy* of the execution, and officer's return thereon commenced, and continued, in all probability, so long as that act was in force. Under the act of 1787, it was the duty of the officer " to cause execution, with his, endoresment thereon, to be entered on the town records." Most likely the practice of recording from a *copy* of the execution and officer's return was not so uniform under this act as it was under the act of 1779. I however presume that no small share of the records were made

from copies. While the act of 1787 was in force, there was no fee bill giving the officer any thing for making a copy for record—all he got was the two shillings and additional fees for travel, mentioned in the act. And when I consider the acts of 1797 and 1798, in connexion with the former acts, I think that the practice of leaving a copy of execution and return thereon for record in the town clerk's office (which practice had existed for about eighteen years in this state) was recognized and sanctioned by the legislature, in and by their act of 1798, wherein they say, "copy of an execution extended on lands, and the return thereof to the officer for record, 0,50." The legislature did not intend this fee to pay an officer for doing an illegal act, but to reward him for doing what they considered a lawful and necessary act. If the officer did his duty in leaving such copy to be recorded, then the town clerk had at least an implied authority to record it, and when recorded, it satisfied the words, "being recorded in the records of lands," &c., used in the act of 1797. But it is contended that there was no more propriety in recording a copy of an execution and officer's return thereon, than there was in recording a copy of a deed. The two cases are not alike : there was a long uninterrupted practice from 1779 to 1821, of recording copies of executions extended on lands in the town clerk's office, where the lands lie ; and this practice was sanctioned by statutes either expressly or impliedly. But there has been no practice nor statute to sanction the recording of copies of deeds in the town clerk's office. A deed is not lodged in any public office for inspection ; therefore, it is often the case, that the only and best evidence of its existence to a purchaser, is its record in the town clerk's office, where the lands lie. This record should be of the deed itself, and not of a copy of the deed. But an execution extended on lands is not carried about in the pocket of the creditor, but is returned into the office from which it issued, and is there recorded. Here every purchaser of the land may see the execution itself, and the officer's return thereon, and a full record of them. Having this source of information, it seems that a true copy of the execution and officer's return put upon the records of the town, where the lands lie, would be sufficient notice to purchasers. Nor am I inclined to censure the practice of recording copies of executions extended on lands under the aforesaid statutes relating to the subject. It was certainly a convenient practice for officers to leave copies in the town clerk's office for record, instead of waiting to have the execution and return recorded. And many cases

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may be supposed, where no other course could be taken, and have the business completed in season for the safety of the officer, and creditor. I do not think it would be just to disturb the landed titles of the citizens of this state by deciding that the *recording of a copy* of an execution extended on lands, and the officer's return thereon, in the town clerk's office, where the lands lie, is *insufficient* in law. It *seems* to me, that taking a full view of the statutes, and the practice under them, *it is sufficient* to record such copy. I say "the practice under them," because it is a rule, that a long uninterrupted practice under a statute is evidence of its construction.—(2 *Dall.* 124.)

The execution in question was levied on land on the 2nd of August, 1820. On the 3d of August the officer left a copy of the execution and his return thereon in the town clerk's office in Hydepark, for record. And the town clerk certifies as follows: "The above is a true record of the officer's copy, received August 3, 1820."

"Attest, *Abner Flanders, Town-Clerk.*"

As the levy of the execution and record of the copy were made while the aforesaid acts of 1797 and 1798 were in force, the Court decide, that the record of the copy is sufficient, if it substantially agrees with the execution and officer's return thereon. If the record does not agree with the execution and return, it is erroneous, and whether the record be void or not, will depend on the error it contains. If the error tends not to the injury of any person, and the record is sufficient to answer all the purposes for which it was made, then it is not void.

But suppose there is no fatal error in this record, (which we do not now decide,) then the question is, who has the better title to the land in question, the plaintiffs or the defendants? The plaintiffs' title was complete on the 3d of August, 1820, and the mortgage deed from Hadly to *McDaniel* was executed, January 10, 1821: so the decree of foreclosure on this mortgage could not affect the plaintiff's prior title. The vendue title of *McDaniel* is defective: the record of the committee's advertisement does not show the year in which it was printed in the Rutland Herald; and no list of lands on which the taxes had been paid was furnished the collector by the committee, so as to enable him to sell or deed for the non-payment of taxes. We have already decided in the writ of review, *John Skinner et al. vs. John McDaniel*, at this term, that the judgement in the action of ejectment in favor of said *McDaniel vs. plaintiffs et al.* was, as it respected the plaintiffs,

utterly void ; because the writ in that action was never served on the plaintiffs, and they had no day in court. There is then nothing in the way of the plaintiffs' recovering in this action, if the variance between the record of the copy in the town records of Hydepark, and officer's return on the execution, be not fatal to the plaintiffs' title. Whether this variance be fatal or not the Court take time to consider, and the case is continued till the next term of this Court.

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After the forgoing opinion was pronounced by Mr. Justice BAYLIES, Mr. Justice ROYCE pronounced the opinion of the Court in the action in favor of *Aaron P. Cleaveland vs. Ephraim Garvin and John McDaniels*, in which was litigated the same question as in the action of *Skinner and Hurds vs. Watson and McDaniels*, with regard to the validity of the levy of an execution upon the lands of the debtor, where the recording of the execution and levy was made, in the town clerk's office, from a copy left by the officer ; there being no dispute, but that the recording contained the true and correct matter, as if it were recorded from the original ; yet it appeared at the close of the record, that it was recorded from a copy. This opinion supported the levy, affirming the opinion in the other cause upon this point : in which opinion considerable stress was laid upon the circumstance that the officers may probably have been led to leave a copy for record with the town clerk, by reason of the statutes allowing a fee to the officer for leaving such copy, and the amount of property, which has been set off in satisfaction of executions, and where the record was thus made from the copy, is very considerable.

After which, Mr. Justice WILLIAMS delivered the following dissenting opinion upon the same point.

WILLIAMS, J.—I do not view this subject in the same manner as it is viewed by my brethren, and feel compelled to dissent from the decision which has just been made.

In passing a title by the levy of an execution, a strict compliance with the statute in every particular is required. The returns of officers setting off real estate on execution have been severely criticised, both in this, and other states, where property is transferred in this way, much beyond what I have thought a just regard to the rights of creditors and debtors required. It has nevertheless always been considered, that the statute must be complied with, and the doubts which have been entertained, have been rather as

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to what shall be evidence of a compliance with the statute, than whether an omission to do what was necessary to pass the title could in any case be supplied by doing something not required.

It appears to me that the statute has made it essential to pass the title, that the execution shall be recorded in the office wherein deeds respecting the same lands are required by law to be recorded, and also that it shall be returned into the office of the clerk of the court, or justice of the peace, from which the same issued, and there recorded. This being done, the statute says, "shall make a good title to the party for whom such estate was taken, his heirs," &c. The statute requires the *execution* to be recorded, and, in my opinion, nothing passes until this is done, and until the *original execution* itself is recorded: recording a copy is neither a compliance with the statute, nor is it of any avail for the purpose of notice, or any other purpose whatever.

Recording is enrolling a paper on the public records, whether of the town or county, by, or under, the superintendence and direction of the officer who is appointed to make the records, and who must not suffer any paper to be enrolled or copied into the records, but such as he knows, or is proved to him, to be the paper intended to be recorded. A departure from this in any instance is to make the evidence of title derived from the record uncertain, precarious, and liable to great fraud and imposition.

One of my brethren has urged, that nothing more is intended by the record than notice of the execution. If this was all the object intended by the recording, still it would be essential that the notice should be such as the statute requires, or it would be no notice at all. I cannot accord with the view which has been taken of this notice, which, indeed, renders it immaterial, whether the record was made from the original, from memory, from a copy, or from a copy of a copy, or from something even still more remote, and which also renders it immaterial, who furnishes the copy for the recording officer, whether the officer levying the execution, the creditor, or even a bye-stander. If all that is required is, that a correct copy of the execution shall be found on the records, it would be as immaterial how it came there, as was said in the argument, as it would be whether the record was made with black ink or red ink.

But such a record of a copy of a deed has been decided by this court to be of no avail. In the case of *Stevens vs. Brown*, in Grand-Isle county, 1830, (3 *Vt. Rep.* 420,) it was expressly laid down and adjudged by this Court, that "the record of a copy

is not in law a record of the original deed, and is no evidence of title;" that "it is a nullity, and cannot be good for the purpose of notice, or avail to any effect in law." The emphatic language of the Court in that case well applies to the recording of the copy of an execution.

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I apprehend however that something more than notice, merely, was intended by this requisition, as to recording the execution. It is made essential to pass the title.

When deeds are recorded, the record becomes evidence of title. The record, or copies from the record, have been decided to be such evidence, and why, I ask, does it not as well comport with the statute for a town clerk to record the copy of a deed, as the copy of an execution, without having any legal evidence of the existence of the deed, or of the execution, and without knowing that they compare with the original? I can see no difference: yet we see that this Court have considered such a record, as to a deed, of no avail, and not authorized. It has been deemed necessary, inasmuch as these records of deeds, executions, &c., are evidence of title, and copies from the record may be read in court without producing the original, except when the original is in the custody of the party making the title, to make legislative provision on the subject of recording. A recording officer is to be appointed: he must be sworn, and in some cases give bonds. He must *know* that the paper recorded is carefully copied on to the records. If it is not done by himself, it must be under his inspection and control, so that in either case, he can certify that it is duly recorded; and he should not suffer nor permit any paper to be copied there, but what he knows to be the paper intended to be recorded. Indeed, the security of our titles depends upon this.

But can the recording officer know that the copy of a deed, or of an execution, given to him, compares with the original, or that there is any deed or execution to be recorded?

The sheriff or officer levying an execution is not made a certifying officer, and copies attested by him are no better authenticated than if attested by any other individual.

If a deed may not be recorded unless there is a certificate under the hand of a magistrate endorsed thereon, that the same has been acknowledged by the grantor, or proved by witnesses, by what process of reasoning can we come to the conclusion, that a copy of another instrument transferring the property of an individual against his consent, not authenticated by the certificate of any offi-

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cer duly authorized, may be placed on the record and considered as a record of the original ?

Again, I cannot assent to the proposition, that all that is required is, for the court to be satisfied, that what appears on record compares with the original, without any reference to the inquiry by whom it was placed there, or from what it was copied. If this was the case, we ought always to compare the record with the original, and the certificate of the recording officer ought not and would not be received, as the slightest evidence that any original ever existed. I admit that the record ought to be a true copy of the original ; but the evidence, and the only evidence, of this fact, is the certificate of him whose duty it was to see that the original was truly copied, and enrolled on the record.

Nor do I see that any argument can be drawn, in favor of thus recording a copy, either from the old statute which was passed in 1779, or in the fee bill in the statute passed in 1797. The statute of 1779 did not make it necessary that the execution should be recorded, in the town clerk's office, to pass the title ; but only required that a copy should be lodged in his office, which he was directed to enter on the town book of records. While this statute was in existence, such a record, as the plaintiff claims in this case, would have been good. Probably from the inconveniences which were experienced under this statute, it was repealed after a few years ; and since the year 1787, the law has always required the execution itself to be recorded.—*Old Stat. Has. ed. p. 67.*

The fee bill of 1797 was also repealed after a few years. There was in that fee bill among the fees allowed to sheriffs, &c., an item of fifty cents, for a "copy of an execution extended on lands, and the return thereof to the office for record." If this would authorize recording from a copy, it would as well apply to the record in the office of the clerk of the court, or justice of the peace, from whence the execution issued, as to the record in the town clerk's office. In the same fee bill, it may be noticed, the fees, which are given to the town clerk, and the clerk of the court, as magistrates, are for *recording the execution*.

There is nothing in this fee bill which repeals the positive directions of the statute, in relation to recording the execution ; and it cannot be repealed by so remote and distant an inference as would be drawn from the expression made use of in the fee bill. This item was probably inserted by mistake, from the practice which has obtained while the statute of 1779 was in force.

It appears to me that the inference to be drawn from the exist-

ance and repeal of the statute of 1779, is not in favor of the position claimed by the plaintiffs, but directly against it ; and that the repeal of the clause in the fee-bill is an argument that the legislature considered, that there was no service to be performed by the officer which entitled him to that fee. I am aware there was a book of forms published some time since, in which the officer is made to state in his return, on an execution levied on land, that he has left a copy with the town clerk for record. I cannot admit however, that a *book of forms*, published by an individual, should repeal a statute.

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I do not know that this form, or a practice under it, was generally adopted or prevailed in this state ; though I am sensible it was so in some counties. Nor do I know that it was ever established by any judicial decision. On the contrary all the decisions, which have come to my knowledge, have been, that a record from a copy of an execution was not good, and passed no title.

It has been urged, however, that these decisions are not reported. I consider them, nevertheless, as authorities which ought to govern our decision in this case. The decisions of this Court do not derive any additional efficacy as authorities, from being reported. A hasty decision, whether reported or not, if it will not bear examination, and leads to great and manifest inconveniences, may be overruled. A course of decisions, whether reported or not, which have been considered as establishing the law, and which affect property to any great extent, ought not to be overruled without weighty and good reasons therefor. Surely, they ought not to be, merely because we think that they might have been otherwise at first.

I think, however, it will be found that the decisions upon this subject in this Court have been uniform, as much so, as upon any subject whatever. I have been informed, that it was so decided prior to the year 1821, and by more than one court : I do not know in what case, or at what time. But when I first came on to the bench in 1822, I found that this question had been decided the year before, while C. J. VAN NESS presided in this Court, and the decision was not questioned in several cases where a title was set up under an execution no otherwise recorded in the town clerk's office than by a copy. In 1823 there were further changes in the members of the Court, so that there was an entire change of the members since the year 1821. During that year this question was considered as settled ; and if I mistake not, this very levy was decided to be bad on that account, during that

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time. This embraces a period of four years, when no doubt was entertained by the bench, that a levy of an execution upon lands when the execution was not recorded, or when only a copy was recorded, was considered as bad, and conveying no title. I am not sensible of a decision to the contrary, either before or since. The language of the present Chief Justice in the case of *Hubbard vs. Dewey*, 2 Aik. 312, has been supposed to countenance these decisions, and was read in this case as an authority against these levies. We learn, however, from him, that this supposition is erroneous ; that the case was decided upon this ground, that from the evidence it appeared the execution was recorded from the original, and not from a copy. The fact had been overlooked by the Court, who had made two decisions against the validity of that levy.

It has been said that many levies have been made in this way, and there is danger in deciding against them. The danger, if any exists, I apprehend will be in overruling these decisions at this time. Property may have been bought and sold upon the belief, that the law was settled agreeably to these determinations. I feel very confident, few persons would have considered a levy, when there was no other record, than from a copy as in this case, as any embarrassment on the title of a debtor. Creditors, who had thus levied their executions, may have obtained a further satisfaction, considering their levy void. This very defendant may have neglected to call on his grantor for any further security, fully relying, that by the decision of the Supreme Court, the law was settled, and his title perfect. If any sheriffs, deputy sheriffs, or constables, have been exposed to hazard by the former decisions, as is said by one of my brethren, I presume no levy has been made in this way very recently ; and they are now protected by the statute of limitations. If they are not, the decisions of this Court should not be changed for their benefit particularly.

HUTCHINSON, C. J., expressed his opinion as follows : this question, whether the levy of execution upon real estate, otherwise perfectly regular, yet recorded in the town clerk's office from a copy, lodged with him by the levying officer, has become very important, by reason of the extensive practice, for many years, to record in this way. And it does appear to me, that strong reasons exist for supporting such levies, if it can be done by any fair construction of the several statutes. In the first place, the creditor never takes real estate for his debts because he chooses it ;



nor because it will be as good for him as the money ; nor because he expects it will come to him at a low price ; but he takes it as the last, and only resort, to save his debt, and knowing that the money would be better for him, and knowing, that he must pay the full value of such real estate. Again, the statutes were calculated to lead to such a practice ; and it would be hard if officers, who are able, should be obliged to make the creditors good for such a defect. If they are not able, the creditor must lose his debt at all events, if such defects are adjudged fatal to the levy. It would not be at all strange, if a well informed officer, when making a levy of execution upon real estate, and knowing that a record must be made in the office whence the execution issued, and also in the town clerk's office ; and seeing the statute of 1798, which gives him a fee in these words, " Copy of an execution extended on lands, and the return thereof to the office for record, 50 cents ;" it would not be strange if such an officer should be led to suppose that a copy must be left, or no fee would be given ; and to enquire for the use of such copy, and be unable to discover any use, unless it were to make the record required by the statute of 1797, and hence conclude, that the leaving of this copy was all that was required of him to enable the town clerk to make the record, required by law. Many officers were thus led to do their business in this way, with no doubt of its correctness. These considerations are of such weight with me, I acknowledge, I have approached the subject with a strong desire to find some fair construction of the statutes that will support the levies which are thus recorded, and which are liable to no other objection.

The statute of 1797 requires, in nearly or quite the same words, the recording of the execution and levy in both offices. There was, undoubtedly, some beneficial object in this requisition. There is no better rule in construing statutes, than so to construe as to give effect to the object intended. It is easy to see, that the recording in the office from which the execution issued, was proper and, perhaps, necessary, to let the debtor see that the judgement and execution were satisfied, and the exact property with which it was satisfied, its description, appraisal, &c ;—to let him see the costs of the levy, and the exact date of the levy and return, whence to calculate when to redeem, if he would redeem at all. There, also, is the place of payment, if he would redeem the premises at all. And there could be no possible use for the statute to require any other record for the debtor himself. He knows before what court he is sued to appear ; and where to go

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to learn every thing connected with the suit. Creditors and purchasers may get information in the same way, at the same office ; but they are not supposed to know where to find that office. They have had no official notice, before what court the suit was brought, or whether there was any suit, that could affect the title of the land. They should be able to obtain such notices as may affect the title of lands, by applying at the office where such titles are usually recorded. Hence the statute provides for the recording of executions and levies in the office of the town clerk of the town where the land lies. The sole object of this must be notice to creditors and purchasers. It is of no use to the debtor, as already observed. He has no right to redeem by payment to the town clerk ; he must pay at the office where the judgement was rendered. If I am correct in this, that the object of recording in the town clerk's office, is notice to creditors and purchasers, what sort of recording will effect this object ? Surely, nothing short of recording the correct matter, which operates as notice. There must be the recording of that, which, if read, gives the same information, as the reading of the original execution and levy. I am not fully satisfied with any reason that can be given for requiring more. Whether the town clerk had the execution and levy before him, and looked alternately upon it and his record book, taking sentence after sentence, or thus looked at a correct copy, or had seen the original a mile off, and so recollected its contents, as to write them verbatim in his record book, seems to me of no consequence to the creditors or purchasers. If the correct matter is written, it gives the correct notice ; and with this they may well be satisfied.

Wherever the law requires originals rather than copies, and excludes copies of copies, the reason of that law is, that, otherwise, mistakes may intervene to the injury of those who might be affected by such evidence, if admitted. In the position I would now maintain, I exclude the possibility of these mistakes, by requiring the right matter to be recorded. This is always capable of proof, or detection, as either party may wish, by comparison with the original, or with a copy of the record in the office, where the judgement was rendered and recorded.

I know there have been some decisions to the contrary of this, as mentioned by Mr. Justice WILLIAMS. These are not reported, so that we might see the exact grounds of such decisions. But I have no doubt of the fact, that, at a time, this court considered the law so settled as to exclude further investigation, than

to learn that the recording was by copy. The decisions in the circuit court of the United States, I believe, have been both ways. The last decision there made, Justice THOMPSON presiding, was as we now decide.

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PHELPS, J., was absent.



**JOSIAH NEWTON vs. HENRY ADAMS, and BOHAN SHEPARD.**

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Where a sheriff attaches property, and returns that he left a copy of the writ at the last and usual place of abode of the defendant, without stating in what situation such copy was left, the service is defective, and the suit abatable; but the attachment is valid, as against subsequent creditors, and trespass may be sustained by virtue of the lien.

If an officer, attaching goods in a building, lock up the building and take the key into his possession, it is a sufficient taking possession, as respects subsequent attachments; and if the officer fail to secure the property effectually, and the attorney or creditor, acting in his behalf, proceed to do so, before any subsequent attachment is made, his attachment is valid.

Although the officer, by taking exclusive possession of the building and excluding the owner, might be regarded as a trespasser *ab initio*, as respects the owner, yet the attachment is valid.

This was an action of *trespass* for taking and conveying away certain articles of personal property, described in the declaration. Plea, *not guilty*. On trial in the county court the plaintiff offered in evidence a writ of attachment and the officer's return thereon indorsed, dated November 10th, 1827, together with the record of a judgement and execution in favor of the *Bank of St. Albans*, against one Anson Field, which writ was served by the plaintiff, as constable of St. Albans, by attaching the property described in the declaration. The return on the writ was as follows:

" *St. Albans*, November 10th, 1827. I then served this writ by attaching a certain piece of land, lying in the village of St. Albans, being the same which said Field purchased of Benjamin Swift, and more particularly described in the deed from Swift to Field, on which said Field has erected a Brick shop; also, at the same time, I attached the following articles of personal property, to wit, 3 bureaus, 1 book case and drawers, 1 writing desk, 8 cherry tables, 1 maple *do.* 2 pine *do.* 4 stands, 3 chests, 1 cradle, 6 low post bedsteads, one field bedstead, 3 high post *do.* 67 unfinished bedstead posts, 1 crick bedstead, about two thousand feet of pine boards, a quantity of furniture trimmings, and butts and screws, and shingle nails, one paint brush, about two thousand feet of cherry, maple and birch boards, lying in Catlin's shed, and one bay mare, all turned out to me by the plaintiffs, as the property of the defendant; and on the same day, I left a true and attested copy of this writ, with my return hereon, thereon endorsed,

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and a list of the property attached, with the town clerk of St. Albans; and I have caused the substance of this writ, and return thereon, to be recorded in the town clerk's office in St. Albans: and I also left another true and attested copy of this writ with a list of property attached, at the last and usual place of abode of the defendant.

Attest, *J. Newton, Constable.*"

To the admission of this evidence the defendants objected, and insisted, that the officer's return on the writ was so defective that the plaintiff acquired no right to said property by virtue of the attachment, as against the defendants, who were subsequent attaching creditors. This objection was overruled, and the evidence admitted. The plaintiff then proved, that on Saturday, the 10th of November, 1827, about 11 or 12 o'clock in the forenoon, he commenced the service of said writ by attaching the property in question, and finished the service about 12 or 1 o'clock the same day. It appeared in evidence that Field left St. Albans, for the purpose of going to Burlington, on Tuesday or Wednesday previous to the attachment, but had absconded; that at the time he left St. Albans, he occupied a building in the village of St. Albans, two and a half stories high, for a cabinet work-shop and ware-house. The lower room was occupied for a work-shop, and the two upper rooms for cabinet-ware and lumber. That when Field went away he left three hands at work for him in said shop; that when the plaintiff attached the property in question, the principle part of it was in the rooms on the second floors; but some part of it was removed from the room on the first floor to the room on the second; that he fastened the windows to the room on the second floor by nailing them down, and the outside doors to the second floor, by nailing a piece of board across the same, and went away, leaving the trap door from the second floor to the first unfastened, and Field's hands at work in the lower room, as usual; that said hands continued at work until Saturday night. The plaintiff had no licence or authority to take possession of, or to fasten up, any part of said building at any time, from Fields, or any person having authority from him, but claimed the right to do it to secure the property attached. No other removal of said property was made than as above stated, and there was sufficient time, on the day the property was attached, to have removed it to some other building. On Sunday evening, the 11th of November, Messrs. Davis and Gadcomb, the former the attorney, and the latter a director of the Bank, without any directions of the plaintiff, refastened the windows and doors to the second floor, and put

a lock on the door of the lower room. On Monday morning early, the 12th of November, *Adams*, as attorney for John Taylor, and *Bohan Shepard*, then sheriff's deputy, went to said building, and broke in a part of the door to the second floor, and took and carried away a part of the property in question, by virtue of a writ of attachment in favor of John Taylor against said Fields. At the time the defendant, *Adams*, was breaking the door to get into the shop, Mr Davis, the attorney, informed him the property in that room was attached. It further appeared in evidence, that on Saturday afternoon, Hoyt and Bixby, creditors of Field, called on the plaintiff and the Bank attorneys and directors, and inquired whether they had been attaching the property of Field? who at first declined giving any information on the subject; but soon after stated they had sent money by Field to the Bank of Burlington, and he had not left it there, and they had attached his property; but if Field had paid over the money, they did not wish any thing to be known about it.

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The defendants insisted, and requested the court to charge the jury, 1st. that the plaintiff had attained no right to the property in question by virtue of said writ of attachment, *Bank of St. Albans vs. Field*. 2d. That the property in question was left in such a situation by the plaintiff, that it was liable to be taken by a subsequent attaching creditor. 3d. That the declarations of plaintiff, and Bank attorneys and directors, to Hoyt and Bixby, were evidence that they intended to keep said attachment secret, and if so, the attachment was fraudulent and void, as against a subsequent attaching creditor. But the court directed the jury, that on the facts aforesaid, the attachment made by the plaintiff was sufficient to hold the property against a subsequent attaching creditor, and that the declarations made by the plaintiff, attorneys and directors of the Bank, to Hoyt and Bixby, had no tendency to deceive or mislead any creditor, and especially the creditor for whom the defendants acted; and would not affect the plaintiff's right to recover. To the decision of the court in admitting the evidence, as aforesaid, and their refusal to charge the jury, as requested, the counsel for the defendants excepted; and a verdict being returned for the plaintiff, and judgement rendered thereon, the cause was ordered to the Supreme Court.

*Smalley and Adams, for defendants.*—1. The title of the plaintiff to the property in question, depends entirely on the validity of the attachment, in the suit *Bank of St. Albans vs. Field*. If that

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writ was not legally served, he acquired no lien. Consequently, this attachment fails. The officer, in his return on that writ, says, that he left a true and attested copy of the writ, with a list of the property attached, at the last and usual place of abode of the defendant; but whether he left it in the fire, or under the floor, or what other place, he does not inform us. All that he states in his return may be strictly true, and yet, he may have left it in such a situation that the debtor would never find it. The object of leaving a copy is to give notice to the debtor. But this object would be entirely defeated, if the officer is at liberty to hide or burn the copy.—*Stat.* 64, s. 26; *Marvin vs. Wilkins*, 1 *Aik. Rep.* 110. In the case cited, the officer says he left a copy of said writ lying on a table, with a copy of his return thereon. Nothing is said about the usual abode of the defendant, nor on whose table. Such a service, the court say, is no service at all. What difference does it make, whether the copy is left at a neighbor's house, or hid under the floor of the debtor's. If it is said the court will presume the officer left the copy in a proper situation, at the debtor's abode. Why not presume, when the officer says he left a copy at a house, that he left it at the debtor's house.

2. If the first position cannot be sustained, yet as the officer did not take and keep actual possession of the property, but suffered it to remain in possession of the debtor, until it was taken by the defendants, who were subsequent attaching creditors, he acquired no right to the property as against them. On this part of the case the inquiry is, in whose possession was the property when taken by the defendants? The property was in the debtor's building, and, of course, in his possession, unless the plaintiff or his agents, had actual, or constructive, possession of the house. We believe it will not be pretended that the plaintiff or his agents had the actual possession of the house when the goods were taken by the defendant. If he had not, the only inquiry is, had he the right of possession?

The plaintiff attaches the property, and, without permission from the debtor, puts it into one of the rooms of the debtor's building, and fastens the outside door and windows to that room, leaving a communication between that room, and the rest of the building then in possession of the debtor, and other outside doors open. In this situation the plaintiff left the building and the property attached. Did the plaintiff by these acts acquire the right of possession to the room where the property was left? This act of the plaintiff in taking possession of the room, and fastening it,

was clearly illegal, and trespass might be sustained against him by the debtor.—*Fullerton vs. Mack*, 2 *Aik. Rep.* 415. Although the officer had a right to go into the building, and continue there a sufficient time to remove the property, yet he had no right to lock up and leave the building, more especially, as he had ample time to remove the property.—*Aikinhead vs. Blades*, 1 *C. L. Rep.* 75. The question then presented is this: The plaintiff commits an unjustifiable trespass on the debtor's house, locks it up, and leaves it. Now, who has the right of possession to the house, the officer who locks it up illegally, or the debtor? If after the officer had left the house, the debtor had gone into the room thus locked up, could the officer have maintained trespass against him? If he could, the officer had the right of possession: if he could not, the right of possession was in the debtor. If, then, the officer have not the actual possession, and the debtor had the right of possession, by what rule of law can it be said the officer had possession of the house. If he had not the possession of the house, he had not the possession of the goods; and if he had not the actual or constructive possession of the goods, his lien, attempted to be created by the attachment, was vacated.—*Carrington et al. vs. Smith*, 8 *Pick.* 419.

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The acts of Gadcomb and Davis in refastening the house, on Sunday evening, cannot alter the case, even if it had been done by the direction of the officer; for if he acquired no right to the possession of the house, by committing a trespass in fastening up the room, he could not acquire any right by committing a trespass in fastening up the whole house.—*Taintor vs. Williams*, 7 *Con. Rep.* 271. But if these subsequent acts would have varied the case, if performed by the directions of the plaintiff, yet, as they were done without his direction, by persons who had no right to interfere in the business, they cannot alter the case. The officer could not be made a trespasser by their acts, done without his consent. Neither can he derive any benefit from them. This was a part of the transaction to which he was not a party, and he cannot, in any way, be affected by it.

*Aldis and Davis, for the plaintiff.*—I. The plaintiff contends that the officer's return is sufficient, at least, for the purposes of this action.

1st. If the return of the officer had stated that a copy was left in the manner which the defendants say ought to have been done, still, Field, having absconded, would have had no notice of the



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suit, and no judgement could have been rendered till an actual notice had been given, or a publication have been made agreeably to the statute. There could have been no necessity of being particular with respect to the manner of leaving the copy.

2nd. But if the court should be of the opinion, that the return on the writ is defective, and insufficient as to Field, yet it is contended that his subsequent appearance in the suit cures all defects as to service. Defects of service ought to be pleaded in abatement, and Field not having done so, the judgement is valid to all intents and purposes ; and no matter of abatement can now be inquired into.

3rd. The only object of leaving a copy of the writ with the defendant, or at his usual place of abode, is to give him notice of the suit, and it is not necessary, in order to give others notice of the attachment ; for that is made notorious by the officer's taking possession of the property. The law does not suppose that creditors will enquire of their debtors to know whether their debtors' property has been attached ; but they are to get the information by enquiring at the place where the property has been kept, or of the person who has possession thereof. If, therefore, the copy which the statute requires to be left with the debtor, or at his place of abode, is not to give notice to other attaching creditors, they cannot claim to have the attachment made void on the ground that the return does not show that such copy was left, so as to give the debtor legal notice of the suit ; especially if it appears that in all other respects the service was good.

4th. It is a settled principle of law, that the defendant in the case of attachment of property, may waive the copy and accept service of the writ, which he could not do if the copy, which is required to be left with him, is for the benefit of other creditors. It has always been deemed sufficient, if the officer serving the writ leave a copy with the defendant at any time twelve days before court, notwithstanding the attachment might have been a long time before ; and it has never been considered that an intervening attachment could hold the property in preference to the first.

II. It is considered by the plaintiff, that the case does not show any fraud in making the attachment, nor that it was done in a secret manner, nor that the creditors ever refused when enquired of, to state candidly that the goods had been attached. They were not obliged to publish the fact to the world, nor make it any more public than the statute required, by leaving the copy with the

town clerk, and the officer's seizing and taking possession of the property, as was done in this case.

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III. 1st. It was not necessary that the goods should have been actually removed from the place where they were attached. Other acts of notoriety, which may notify the creditors that the goods are in the custody of the law, may be equivalent to a removal.—*Vide Train vs. Wellington*, 12 Mass. 495 ; *Baldwin vs. Jackson*, do. 131.

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2nd. The case shows that the goods when attached by the plaintiff were all secured in a room of the building where they were found, the doors and windows fastened ; that a lock was afterwards put on the outside door, by one of the creditors, and that the defendants had actual notice of the plaintiff's attachment. These facts show that the goods were actually seized and taken possession of by the plaintiff, were in his possession at the time the defendants took them away, and that all this was known to them at the time the trespass was committed.

3rd. To constitute an attachment of goods in a shop or store, it is sufficient if the officer after seizing the property, leave it in the building, and fasten the doors, by locking them, or otherwise securing them, as this would be sufficient notice to creditors that the goods had been attached, and were in the custody of the law. *Vide Denny vs. Warren*, 16 Mass. 420 ; *Gordon vs. Jenny*, 16 Mass. 465.

4th. It cannot be said that the property attached was left in the possession of the debtor, as he had absconded.

**PHELPS, J.**—The plaintiff's title to the property in question, and, of course, his right to recover, depends upon the validity of the attachment of the property, made by him, as constable of St. Albans, at the suit of the *Bank of St. Albans* against *Anson Field*. The defendants contest its validity, upon two distinct and independent grounds. The first is, that the plaintiff's return of his doings is so defective as to render the attachment nugatory, and the second, that he neglected to take that possession of the property which the law requires, in order to give validity to his lien, as against the creditors of Field, one of whom the defendants represent.

That the return is defective, must be conceded. A return, that he left a true and attested copy of the writ, at the last and usual place of abode of said Field, without stating the situation in which such copy was left, clearly does not shew a compliance

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with the statute directing the mode of service. See *Rev. Laws*, p. 64; *Marvin vs. Wilkins*, 1 *Aik. Rep.* 110.

But an important question here arises, whether this service is to be considered as absolutely void, or voidable merely. In the former case, no after proceeding can give it validity, but in the latter, the defect may be supplied, cured, or waived.

The object of the service was two fold, viz., to obtain security on the property, and to give notice to the defendant; but the purpose of leaving a copy with the defendant is to give notice merely. The attachment is effected by seizing the property; and from necessity this is prior to giving notice to the defendant. The title of the officer must be good in the interim; and, of course, trespass might be sustained for the taking, without shewing a copy to have been previously left. If no copy be left within the time allowed for serving the writ, the attachment might be considered as abandoned: but the attachment is certainly good, if a copy be left with the defendant at any period within that time. The law requires but twelve days notice in such cases, and it makes no distinction, in this respect, between cases where property is attached and others. The most which could be contended for, is, that a copy should be left within a reasonable time, in order to give notice to other creditors. What would be the effect of unnecessary delay in this respect, it is not necessary now to decide, as the case furnishes no ground for such an objection.

Supposing it necessary, however, that a copy should have been left in this case, in order to protect the attachment, the question recurs, what consequence is attached to the defect in this return?

There can be no doubt that the officer might have been permitted, after the entry of the suit, to amend his return, and to add, if the facts would warrant it, all that was necessary to render his return conclusive evidence of notice to the defendant. It would also be competent for the plaintiff, under certain circumstances, to prove the actual reception of the copy by the defendant. And, even if no actual notice had been given, it would have been proper for the court to have continued the action, and directed notice, as provided by statute. There are many cases, where the court may proceed to judgement, although there has been no actual notice, leaving the party to his remedy by writ of review. In all such cases the property attached is holden to respond the judgement.

So too, the defect might be cured by the defendant's appearance and pleading to the action. See 1 *Aiken's* 110. For

aught we know, the defendant, Field, might have been out of the state, at the time of service, and the case continued agreeably to the statute ; and for aught we know, he appeared, and answered to the suit.\* At all events, this subject of notice was under the control of the court, to which the writ was returnable ; and they having proceeded to judgement, it is to be presumed, that the defect was cured or supplied. Their proceedings are to be presumed regular and valid, and are not to be impeached in this collateral way. The result is, (and in this we are all agreed,) that the service in question is valid to create a lien on the property, and is a sufficient title to sustain the action.

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It is further contended, that the plaintiff did not take such possession of the property attached as the law requires, to protect it against subsequent attachments.

That it was necessary for him to take possession of the property, is not questioned ; but it is insisted by the plaintiff, that the acts done by him did amount to such possession as the law requires. All that can be necessary, in such cases, is that such possession shall be taken, as will give sufficient notoriety to the attachment. This is done when the property is so far in the custody of the officer, as necessarily to exclude acts of dominion over it by others. In this case, a part of the property was left in the room where it was found, and a part was removed from another room and deposited there. The plaintiff proceeded to fasten the doors and windows of the room ; and had he done so effectually, there would have been no question on this point. It seems, however, that from some cause, and, perhaps, from accident, one avenue to the room was not secured. We are not prepared to say, that such an omission would render the attachment fraudulent. Had this been done with a view to give the former owner access to it, the case would have been different ; but, in this case, it does not appear that he was aware of the existence of the trap door, and such an avenue to the room might hastily have escaped his notice. He certainly attempted to secure the property within his own control ; and to predicate fraud upon a mere oversight, would be a novelty in jurisprudence. Nor can it with propriety be insisted, that an officer is bound, in order to avoid the implication of fraud, to secure the property effectually against thieves or trespassers. The very idea, that the action of trespass may be supported by an

\*It appears from the record, that Field did appear by attorney and answer to the suit. This circumstance not having been mentioned in the bill of exceptions, it probably escaped the attention of the Court at the time the opinion was delivered.—*Ed.*

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officer, by virtue of his lien, presupposes that the property may lawfully be left by him in a situation to be eloiigned by a mere act of trespass. Had Field been present, or in possession of the building, or in a situation to exercise acts of ownership over the property, it might have varied the case. But he had absconded ; and, although some of his servants were in another part of the building, yet it does not appear that they had, either before or after the attachment, assumed any control or authority over the property in question.

But, admitting that the plaintiff did not originally take a sufficient possession, yet we all agree, that, if he did subsequently, and without any intervening attachment, acquire a sufficient possession, the rule of law is satisfied, and his attachment is valid.

It appears that the day following the attachment, the attorney of the creditor proceeded to take the exclusive possession of the building, and to exclude all access to the property. As this was done, evidently in behalf, and for the benefit, of the plaintiff, and with a view to protect his lien, we consider, that, although the act was purely voluntary on the part of the attorney, the plaintiff is entitled to the benefit of it. It having been done professedly under his authority, he was at liberty to sanction the proceeding, more especially, as there was a sort of privity or connexion between them as agents of the creditors.

At the time of the attachment by the defendants, the building was in the exclusive possession of the plaintiff or his agents. All others were excluded, and the defendants found it necessary to break the door, in order to get access to the property. Whatever, therefore, might have been the previous state of things, the plaintiff had, at the time of the attachment by the defendants, an actual unequivocal possession of the property.

It is urged that the plaintiff's possession is to be considered unlawful, inasmuch as the proceeding in taking possession of the shop, is contended to be a trespass ; and authorities are cited to show, that an officer is liable in trespass, for unlawful acts committed under such circumstances. It is admitted, however, that the original entry of the building for the purpose of making the attachment, was lawful ; and the supposed trespass consists in subsequently excluding others. Without stopping to enquire, whether an attachment effected by breaking the dwelling of the defendant, which is under the protection of the law, would be valid or not, it is sufficient, for the purpose of the present case, to remark, that the attachment, being originally lawful, could not be affected by

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any subsequent act of the plaintiff of the character mentioned. Although the subsequent unlawful act (if unlawful it was by fiction of law, render the officer a trespasser *ab initio*, fiction of law would not extend to the lawful official act in which the creditors were interested.

The judgement of the county court is affirmed.



### JOSEPH ADAMS vs. SAMUEL CAMPBELL.

In debt on a judgement recovered by an executor in his representative capacity, it is not necessary that the plaintiff should describe himself as executor.

The omission of the *debit* and *detinet* in such a case in the declaration is a special demurrer.

**Action of *debt* on judgement.** The declaration was as follows:

"Now the plaintiff here in court comes and declares the defendant in a plea of *debt*, for that the said *Adams* Peter Sawyer, late of South-Hero, in the county of Grand Isle, since deceased, as administrator of all and singular the chattels, estate, debts, dues, and credits, of John Stark, South-Hero, aforesaid, by the consideration of Alpheus H. Stark, one of the justices of the peace, within and for the county of Grand Isle, on the 16th day of August, 1823, at South-Hero, did recover judgement in their favour against the said *Campbell* by the name of *Samuel Campbell*, of St. Albans, in the county of Franklin, aforesaid, for the sum of twenty three dollars and forty one cents, damages, and for twenty-five cents for confession, as by the record thereof now remaining in said court, ready in this court to be shown, will more fully and clearly appear; which said judgement now remains in full force and effect, and not in any way reversed, annulled, satisfied, or void: whereby an action hath accrued to the said *Adams*, and recover of the said *Campbell*, the said several sums of twenty-three dollars and forty-one cents, and twenty-five cents, making, in the whole, to twenty-three dollars and sixty-six cents. Yet the said *Campbell*, although often requested, hath neglected the same; but wholly neglects and refuses so to do; to the great damage of the plaintiff, as he says, sixty dollars."

The defendant demurred to the declaration, and assigned the following special causes: 1. That it was not alleged in said declaration the defendant *owed* to or *detained* from the plaintiff a sum of money whatever. 2. That the sum of damages specified in the pretended judgement mentioned in the plaintiff's declaration was set forth in several different sums, and not in an aggregate. 3. That the plaintiff in his declaration did not demand the recovery of either his *debt* or damages. 4. That the

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tion was in other respects altogether vague, uncertain and insufficient.

*Smith and Royce, for the defendant*, in support of the demurrer, cited, 1 *Chit. Pl.* 291; 1 *Saund.* 111, 112; *Hammond on Parties*, 154; 1 *Chit. Pl.* 203, 100, 344, 87, 88, 360; 2 *do.* 179; 6 *Mod.* 306; *Gilb. on Debt*, 399, 400, 359.

*Smalley and Adams, for the plaintiff*, cited, *Lord vs. Houston*, 11 *East*, 62; *Saund.* 405; 3 *B. C.* 155, 295.

PHELPS, J.—Several points are made in this case. The declaration is alleged to be bad,

1st. Because the plaintiff declares in his private right and not as executor. Some difficulty has occurred on this point, but it has been generally in those cases, where an attempt has been made to join different distinct causes of action in one declaration. No question as to joinder of action is raised in this case. The simple question here is, whether the plaintiff can maintain the action in his private capacity.

That he might sue in his representative character is evident from the consideration, that the declaration shews the demand to be assets in his hands. But may he not sue also in his private capacity? It is a general rule, that for causes of action arising during the life of the testator, the executor must sue in his representative character; for it is in this character only that he is entitled to the action. But upon a cause of action accruing to him after the decease of the testator, and where no right was vested in the testator, the executor should sue in his private capacity. Thus upon a contract entered into by him subsequent to the decease of his testator, although that contract may concern the testator's estate, he should sue in his private character, as the person in whom the right originally vested.

The mode of declaring has always reference to the proof required to sustain the action. The declaration should allege that which the law requires to be proved, and it need not allege that which is not necessary to be proved. Whenever, therefore, it becomes necessary for the plaintiff to show his representative character, or, in other words, to make *profert* of his letters testamentary, he should sue in his representative character; but on the other hand where this is not necessary, there is no reason for requiring the setting up that character in the pleadings. Perhaps



no better criterion, by which to settle this question, than it necessary to prove his letters testamentary? It cannot be, if the former judgement is to have its usual and full effect. That judgement is conclusive of the plaintiff's recovery, and as conclusive of his representative character for other fact which was necessary to be proved. The effect of that judgement was to vest the right in him personally; at common law, no other person could prosecute or control the action. Hence the necessity of our statute authorizing an executor *de bonis non* to prosecute in such cases. This because, it was not necessary for the plaintiff to describe himself as executor or administrator.

It is argued, however, that the different capacity in which the plaintiff appears in this and the former action, is virtually a change of capacity. If this be so, it is no more than was effected by the former judgement. In that instance his right of recovery depended on his representative character, but in this, upon his being executor of the former judgement. It was, indeed, necessary to describe him as having been recovered in that character, to avoid a variance; but it being so described, the reason for the change of capacity appears on the face of his declaration. The objection, therefore, is correctly brought.

It is contended further, that the declaration is bad for any allegation that the defendant *owes* or *detains*. This, if it be one, is a mere matter of form, and a ground of demurrer only. But matters of form are so interwoven with the rules which determine the rights and liabilities of parties, that it would be dangerous to dispense with them. Sealing is a matter of form; but to hold it to be immaterial would unsettle a portion of the law of contracts.

The omission of the *debet* and *detinet*, is a ground of special demurrer, appears from 2 *Chitty's Pleadings*, p. 179, and 6 *Mod.* 6. It is sufficient on this point that the precedents are so. The case of *Lord vs. Houston*, (11. *East.* 62,) cited by the court, turns upon the mode of declaring peculiar to the court of common law. *Ld. Elenborough*, after alluding to the difference of declaring in the two courts, says, "There is no occasion for giving any opinion as to the mode of pleading in the common law."

The declaration is, for this cause, insufficient.

(The declaration was amended upon terms.)

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DANIEL LOOMIS vs. MICHAEL BARRETT.

In an action on book account between A and B, a claim in favor of A against B and C, as partners, is not proper to be taken into consideration by the auditor, and an objection to such a claim is not waived by not pleading in abatement.

This was an action on book debt brought before Franklin county court. Judgement having been rendered upon *nil dicit*, that defendant account, the case came before the auditor for hearing, who, having audited and adjusted the account, made the following report, viz.

“ Your auditor further reports the following facts, in relation to the plaintiff's account hereto annexed. In September, 1823, the inhabitants of Henrysville, in Lower Canada, undertook to build a brick school house there by subscription, and appointed a committee for that purpose. This committee put up the job at public auction to the lowest bidder, on condition, that the person undertaking should furnish all materials. Morris Dixon, one of the committee, who transacted the business at the auction, stated at the time, that the bricks could be had at \$4,00 pr. thousand, and that the plaintiff had them for that price. The defendant, being the lowest bidder at the auction, undertook the job for \$227, on the conditions above mentioned. Afterwards, during the progress of the work, when the defendant had occasion for bricks, Dixon desired him to take them from plaintiff's yard, at the same time informing defendant, that plaintiff had taken up goods from his, Dixon's, store on account of the bricks. The defendant accordingly employed teams to get the bricks for the school house, and the plaintiff delivered the bricks charged in his account to said teamsters, to the amount of 28,360, as the teamsters called for them, and charged them to the defendant on book at \$4,00 per thousand, without any bargain or contract with the defendant in relation to the bricks (except what may be inferred from what Dixon stated at the auction aforesaid, in presence of defendant and plaintiff,) and without informing the defendant that the plaintiff should charge the bricks to him, or look to him for payment, till the first part of January, 1829. The plaintiff, at the time he delivered the bricks, as aforesaid, expected to be paid for them \$4,00 per thousand, when the subscription should be called for by Dixon, who it appeared had the collection of the subscriptions some what in charge, though the plaintiff considered the defendant holden to him for the bricks. Plaintiff called on Dixon frequently who always refused. In the winter of 1824, defendant removed from Henrysville into this state, after having completed the job, and received about \$100 on the subscriptions aforesaid, leaving the residue in the hands of Dixon, supposing he was not liable to plaintiff for the bricks, but that plaintiff would be paid by Dixon, and did not visit Henrysville till a short time before this trial. During the time the defendant was at Henrysville, he was in

partnership with one John McGrath in the brick laying business, both as respects the school house aforesaid, and Austin Adams' house, mentioned in the plaintiff's account; and the articles in the plaintiff's account were furnished for the defendant and McGrath in their partnership business. McGrath laboured with the defendant some part of the time in building the school house, and Adams' house. The defendant contended, that the plaintiff ought not to be allowed his charges for the bricks, because there was not any express bargain and sale thereof to the defendant, and that he could not recover of the defendant alone, but ought to have joined McGrath in the action, and that if the account was allowed, interest ought not to be computed thereon. But the auditor decided that, from the foregoing facts, the defendant was liable in this action for the bricks, and that it was too late to take advantage of the nonjoinder of McGrath; and allowed the plaintiff's charges for 28,360 bricks, at \$4.00 per thousand, the items for drawing bricks and stone, sand and lime, for the school house, amounting to \$114.19, with interest thereon 64 months, making \$35.54 interest. The item of plaintiff's account for sand for Austin Adams' house, \$11, was not allowed, as not being a proper item of book account; it appearing to be for the privilege of going on to the plaintiff's land, and digging and carrying away the sand: All which is respectfully submitted."

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Upon the coming in of this report, the defendant filed his exceptions thereto, objecting to the decision of the auditor in two particulars. The first was, that the auditor adjudged the defendant to be indebted to the plaintiff for the bricks mentioned in the report, and the second that the auditor overruled the objection, that the bricks, if chargeable to him at all, were properly chargeable to himself and McGrath, as partners, and were not therefore a proper subject of adjudication by the auditor in this case. The county court overruled the exceptions and rendered judgement on the report. To this decision of the county court, affirming the decision of the auditor, the defendant also excepted, and the case was brought to the Supreme court for revision.

*Hunt and Beardsley, for plaintiff.*

*Smalley, for defendant.*

PHELPS, J., delivered the opinion of the Court.—The point principally relied on by the defendant, and the only one which it is necessary for the Court, on this occasion, to notice, is, whether the objection, that the claim in question was strictly a claim against the defendant and McGrath as partners, and not against the defendant alone, was available before the auditor. It is contend-

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ed by the plaintiff, that the objection is founded on mere matter of abatement, and should have been so pleaded ; that not having been pleaded in abatement, the defence is to be considered as waived, and as not available upon trial on the merits. Of this opinion was the auditor, who probably considered himself bound by the general rule as laid down in the books.

There is no rule better settled, than that in actions *ex contractu* the non-joinder of a person who should be made defendant, is pleadable only in abatement. The reason of this rule is obvious. The defence is merely dilatory in its character—it does not concern the merits of the claim, and it is the policy of the law to distinguish between those defences, which serve merely to defeat the action, and those which, going to the merits of the claim, lay a foundation for a final and conclusive decision. It is also well settled, as a general rule, that all dilatory pleas should be filed at the first term of the court to which the action is brought ; and it is provided by the rules of our courts, that they be filed within a specified period, which is generally early in the term. The principle of the rule whether, as a part of the common law, or as an arbitrary rule of court, is, that defences, which serve merely the purpose of delay, should be made at the earliest possible opportunity. The propriety of this rule cannot be doubted, nor its salutary tendency denied.

But it is also an axiom, which will not be questioned, that if the law, in any given case, allows a particular defence, there must be a period, when, in the progress of the suit, that defence may be properly and effectually urged. The rule which I have just mentioned is not intended to violate this axiom, or to exclude altogether any legal or proper defence ; but simply to compel the party to present such as are of a dilatory character at the earliest stage. Hence the rule never applies, until an opportunity is offered to plead the defence. In accordance with this doctrine, it has always been held, in cases where actual notice has not been given to the defendant before the entry of the action, but particular notice directed by the court, agreeably to the statute, that a plea in abatement at a subsequent term is seasonable and proper.

The rule itself, as well as the reason on which it is founded, undoubtedly applies to the action on book account as well as in any other ; but the inquiry is, at what stage of the action such a defence becomes available and proper ? The action on book account is an anomalous proceeding, created by statute, and bearing no analogy to any form of action, except that of account at common law.

It is indigenous in New-England, unknown in the jurisprudence of that country from which we derive our law, and unknown in most of the states. It is not to be expected, that much should be extracted from books in relation to its principles ; especially as the action of account, to which it is allied, is mentioned by most elementary writers, rather in the way of honorable remembrance, than with the purpose of explaining its principles or ascertaining its incidents.

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The declaration in this action is general, alleging a general indebtedness, but setting forth no specific claim as a subject of distinct litigation. It embraces, however, within its purview all that variety of claims, which by the law or usage of the country, or the particular course of dealing between the parties, become proper subjects of book charge. The defendant is not presumed to know the precise items of charge which the plaintiff may present before the auditor, nor can he be compelled to anticipate in his defence the specific claims which the plaintiff may ultimately urge. He has no opportunity to plead in abatement as to any particular claim, nor can he be compelled to answer thereto until such claim is specifically presented. This is first done at the hearing before auditors, and the objection, if taken here, is taken at the earliest opportunity. There is certainly no ground for presuming a previous waiver of the objection, and the admission of it here consists with the reason of the rule.

The position that such a defence is not admissible before auditors, is predicated on the assumption that it may be pleaded in abatement. It is difficult to perceive to what such a plea in abatement could apply. The plea would be directed rather to the evidence to be presented by the plaintiff on a future occasion, than to the cause of action, as set forth in the declaration ; and it would by a task of no easy accomplishment, to form an issue under such circumstances, the decision of which would be effectual. The defence at this stage of the action is premature.

Could such an issue be formed, yet the difficulty is not surmounted. The plea must be ineffectual unless the objection hold good to all the items of the plaintiff's account. It is evident, therefore, that the trial of such an issue would necessarily involve the whole account, the allowance or disallowance of other claims not subject to the objection, and, in general, every consideration connected with the question as to the ultimate balance. In this way the whole duty of the auditor is transferred to the jury, and that under circumstances which exclude the legitimate evidence in the

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case, the party's own oath. Another and further trial by auditors, as required by the form of proceeding in the action, would not only be unnecessary, but would exhibit the absurdity of two trials in the same case, as it might be upon the same issue, involving the same questions of law and fact, yet upon different rules of evidence. Besides, if the question is drawn within the cognizance of a jury, the mode of proof is changed. The statute gives the parties the right of being witnesses before auditors, and they are undoubtedly competent witnesses as to the question on whose or what account the property delivered, or money paid, was delivered.—See 2 *Aik.* 81 ; and same, 386.—This right becomes, when we consider the inducement held out to the parties, by the law, to rely on their own testimony, and forego other evidence, doubly important, and ought to be protected. They cannot however be witnesses on a trial by jury ; and thus the evidence sanctioned by statute as legitimate to support the issue, is by the mode of trial excluded.

It may further be remarked, that a plea in abatement, upon the ground suggested, would be of no avail, unless it went to the whole account of the plaintiff. Upon the supposition, therefore, that the item or items contested upon this ground are accompanied by charges properly made to the defendant alone, the plea would be bad. It must be overruled, and unless the objection can be renewed before auditors, partnership debts to an indefinite amount might be charged upon one partner without a possibility in any stage of the action of making this defence.

It is suggested, however, that the defendant might pray oyer of the account, and, having a transcript furnished him, might plead in abatement as in other cases ; but when it is considered that the plaintiff is not bound by his profer, but may on trial before auditors, go into evidence of other and different charges, (see *Read vs. Barlow*, 1 *Aikens' Rep.* 145,) the argument fails. A fictitious account would necessarily lead to a full trial on the merits, and the existence of a single charge, justly made against the defendant alone, would defeat the objection. The jury could not discriminate, and unless the objection could be made before auditors, the consequence already mentioned would follow.

It is apparent, therefore, that, as the peculiar form as well as mode of proceeding in this action, precludes this defence by way of abatement, neither the rule as to abatement, nor the reason on which it is founded, forbid the defence before auditors.

There is another rule upon which our decision may be justified.

re in all cases limited to matters coming within the pur-  
 he action. The declaration on book claims a balance  
 the defendant, on the account between the *parties*.  
 ng that account, the auditors are confined to what prop-  
 ertains to it. An account between other parties, invol-  
 ings with persons not parties to the suit, and implicating  
 its, does not come within the compass of the suit, nor  
 e purpose of the auditor's appointment. The principle  
 , upon which the claim in question should have been  
 by the auditor, has no connexion with the subject of plea-  
 abatement. Where indeed the declaration is specific,  
 in issue a particular claim, the objection that another  
 made a defendant, as being interested in that claim, is  
 matter of abatement. The distinction between such a  
 the present is, that in the former, the claim is distinctly  
 re, and in the latter, is not drawn in controversy at all.  
 be added, that if the introduction of partnership claims is  
 n one side, it must be on the other, and in case of sever-  
 erships in which either of the parties might be interested,  
 pt to plead the transactions of the various firms in one  
 and extract from it a simple balance, would tend to in-  
 concerns of all in inextricable confusion. The impro-  
 such a course forms a sufficient objection to it ; and this  
 is not derived from, nor has it any connexion with, the  
 f abatement.

judgement of the county court must therefore be reversed.

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at, made at the time of the sale of a farm, that the notes given for the pur-  
 be satisfied by paying an incumbrance on the farm, is binding on the  
 not revocable at pleasure.

goes only in mitigation of damages need not be specially pleaded.

a demand in suit, made pending the action, are of course to be deducted  
 up judgment.

sist on two promisory notes dated April 2d, 1827,  
 an for \$100, payable on or before the 1st day of April,  
 eat cattle, or in grain the winter previous, with interest ;  
 for \$60, payable by the 1st day of April, 1828, with  
 Plea, *non assumpsit*. The action had been com-  
 efore a justice of the peace, in May, 1828, and after sev-



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eral continuances, judgement was rendered for the defendant, and the plaintiff appealed to the county court. On the note first mentioned, there was endorsed, in part payment, the sum of \$68,67, and on the other \$1,23. It appeared that these notes, with several others, were executed by the defendant to the plaintiff, in consideration of the purchase of a farm of the plaintiff; that the plaintiff had executed a deed of warranty in the usual form, and had taken a mortgage of the defendant to secure the payment of the notes. At the time the deeds and notes were executed, the plaintiff gave the defendant a memorandum in writing, stating that one Arad Merrill held a note against him, the plaintiff, for about one hundred dollars, which was secured by mortgage on the farm; and agreeing by said writing, that if defendant should pay said note to Merrill, the amount thereof should be endorsed on the notes due from him to the plaintiff. The defendant also proved by the testimony of Merrill, that the agreement between the plaintiff and defendant was, that the defendant should pay the note to the witness, and that defendant, at the time he purchased the farm, agreed with the witness to pay the note to him, and had accordingly made payments from time to time, until the whole amount was paid—the last payment being made June 7th, 1828, after the commencement of the action. The amount paid to Merrill on this note exceeded the balance due on the notes in suit. It appeared that one of the notes given by the defendant to the plaintiff for the farm, had been sold to one Bellows, and was still in his hands, and it did not appear that the plaintiff held any notes against the defendant, except the two notes in suit. It also appeared that the plaintiff was poor and destitute of property.

The plaintiff proved that, previous to the commencement of this action, he requested payment of the defendant, and the defendant said he should not pay him any more until he had a settlement; and that, after this action was brought, and there had been one or two continuances of it, the defendant said, he had taken up the note given to Merrill, and was prepared to defend the suit.

The counsel for the plaintiff objected to the several matters given in evidence on the part of the defendant, as aforesaid, and insisted that, as the note given to Merrill had not been paid and taken up by the defendant before the commencement of this action, the evidence was inadmissible under the general issue; but the court overruled the objection, and decided, that, as the note given to Merrill was an incumbrance on the farm purchased by the de-

Tendant from the plaintiff, which it was the duty of the defendant to remove, and the plaintiff *had* agreed that if the defendant paid the note, the amount should be applied on the notes given by the defendant to the plaintiff for the farm, the evidence, under the circumstances of the case, was admissible under the general issue in mitigation of damages, although the defendant had not fully paid the note before the commencement of this action, but a *considerable* part of it was paid afterwards.

The jury returned a verdict for the plaintiff for one cent damages; and he having filed exceptions, the cause was brought up to this Court.

After argument, the opinion of the Court was delivered by,

**PHELPS, J.**—If the authority given to the defendant to make payments to Merrill, is to be regarded as a mere licence, revocable at pleasure, then, it must be admitted, that the bringing the present action was a revocation of that licence, and all subsequent payments made to Merrill must be considered as made without authority and, therefore, voluntary. And if we regard the written memorandum as evidence of a distinct independent contract, it would be difficult to give it any greater effect than a mere revocable licence, for want of a sufficient consideration to support it. But as the memorandum was executed contemporaneously with the execution of the note, we are disposed, in conformity with the testimony of Merrill, to regard it as part of the original contract for the sale and purchase of the farm, and, therefore, needing no particular consideration, applicable to this part of the contract exclusively, to give it effect; especially as the agreement in question was evidently intended to provide for an incumbrance on the farm, and to secure the purchaser against the supposed inability of the plaintiff to remove it. In this point of view, the agreement must be considered as entering into the consideration of the notes, as part of the terms of the purchase, and equally binding on the parties as any other part of the transaction.

The poverty of the plaintiff, as stated in the case, not only furnishes a reason why the stipulation should have been introduced, but affords strong grounds for enforcing it. The defendant had certainly a right to insist upon it for his security; and if so, it follows that the permission to make the payments to Merrill was not revocable at pleasure. We have a precedent for this, in the case *Lewis vs. Holley et al.* reported in *Brayton*. In that case, the direction was considered as an inducement to make the

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principal contract ; and there, as well as here, a third person had become interested in the direction ; and to revoke, it involves a fraud upon all concerned. Whether the agreement, and the payments made under it, would, if properly pleaded, have been a bar to the action, is a question not involved in the case. It would be difficult, however, giving to the agreement the effect above stated, to distinguish between this case and a case of payment to the plaintiff himself. The evidence of these payments was received by the county court in reduction or mitigation of damages. For this purpose, it was undoubtedly proper. In every action of this nature, the question as to the amount due is decided with reference to the time when judgement is rendered ; and payments, made pending the suit, are to be deducted, for the obvious reason, that the judgement is conclusive on this point, and payments not applied would be lost to the party.

The objection that the evidence was not admissible under the general issue, but that a special plea, *pais darrein continuance*, was necessary, might possibly have been well founded, had the evidence been offered in bar of the action ; but we are aware of no case where matter, which goes merely in mitigation of damages, is required to be specially pleaded. From the nature of the case, it could not be ; for the supposition that it goes only in mitigation of damages, implies that it is no bar to the action.

Judgement affirmed.

*Hubbell & Stevens*, for plaintiff.

*Hunt & Beardsley*, for defendant.

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JOSEPH KINGSBURY vs. ROSWELL BUTLER.

There is no difference between a note payable "when demanded," and one payable *on demand*, and in both cases the statute of limitations begins to run from the date of the note.

When the statute of limitations is pleaded to an action on promissory note payable "when demanded," the plaintiff will not be allowed to prove the note had been lost for a time, in order to rebut the presumption that a demand had been made.

This was an action of *assumpsit* on a promissory note dated June 4, 1816, payable "when demanded." Plea, that the cause of action did not accrue within six years before the commencement of the suit. On trial in the county court, it appeared the plaintiff had demanded payment of the defendant on the 10th day of July, 1829, a short time before the action was commenced, and

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the plaintiff contended that the cause of action did not accrue until such demand was made; and with a view of rebutting any presumption that a demand of payment had been made previously, he offered to prove that the note had been lost or mislaid for considerable length of time previous to the demand proved, at commencement of the suit. The evidence was objected to, and rejected by the court. The court instructed the jury, that the cause of action accrued on the execution of the note, and that the plaintiff was therefore barred by the statute of limitations. The jury accordingly returned a verdict for the defendant. The plaintiff excepted to the decision of the court, excluding the evidence of the loss of the note, and also to the charge to the jury; whereupon the cause was brought up to this court for revision.

*Aldis and Davis, for the plaintiff.*—The words “*when demanded*” may receive a different construction from the words “*a demand*.” A note payable “*when demanded*,” is not due before a demand is made, and it must have been so understood by the parties, at the time the note was executed; else they would have written it in the common form, “*on demand*.” The words “*when demanded*” very forcibly convey the idea, that the note is not to be paid till the payee demands payment. They signify a condition precedent, which must be performed before the payee has a right to sue for the money. The statute of limitations did, therefore, not begin to run, till the plaintiff made a demand of payment which, as appears by the case, was not six years before the commencement of the action.

But should it appear to the Court that the expressions, “*when demanded*,” and “*on demand*,” mean the same thing, and are not capable of a different construction, still, it is contended no cause of action accrued in this case till a demand of payment was made. It has been considered that a note payable on demand, is payable on presentment, but might be sued without actual demand having been made; because, say the books, the service of a writ is a demand. But admitting this to be law, it does not follow, that any cause of action arose before the commencement of the suit. A note payable “*when demanded*,” or “*on demand*” is payable at the will of the payee; and until he signifies his will in making a demand, the note cannot be said to be due, and all the authorities which say, that no demand is necessary before bringing an action, virtually acknowledge that some demand is necessary for, say they, “the commencement of the suit is a demand”.

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clearly implying that without some sort of demand a recovery cannot be had. No adjudged case has established the principle, that such a note is payable before a demand; but for the convenience of the payee, the courts have considered that the commencement of a suit may be construed into a demand. From that time the note is due, and then, and not before then, does the statute begin to run. If there has been a previous demand, then it begins to run from such actual demand.—*Topham vs. Braddick*, 1 *Taun. Rep.* 571; 2 *Stark, Ev.* 891.

The plaintiff contends that the court erred, in rejecting the evidence to prove that the note had been lost for a time previous to the commencement of the action. This evidence was proper as it furnished a reason for not demanding payment before the six years had run, and to do away any presumption, that a demand had been made.

*Hunt and Beardsley, for the defendant.*—It is contended by the defendant that a note payable “when demanded” is really a note payable *on demand*, and agreeably to the usages of law, due and payable on the execution thereof; and no act or demand is necessary to lay the foundation of a suit: of course, the cause of action did accrue to the plaintiff at the date of the note, and not at the time of the pretended demand of payment.—*Bal. on Limitations*, 318; 1 *Sw. Dig.* 699; *Willes’ Rep.* 632; 2 *Stark.* 622. The note having been lost could not vary the case, nor alter the time when the cause of action accrued to the plaintiff: therefore, the court did right to exclude the testimony offered to that point.—*Bal. on Lim.* 84; *Bayley on Bills*, 196; *Thrackroy vs. Blacket*, 3 *Camp.* 145.

WILLIAMS, J.—It would seem as though there was no question in this case, except whether a note payable *when demanded* requires any thing on the part of the payee more than a note payable *on demand*. There may be a distinction, and, as has been facetiously remarked, the law is a science of distinctions; but if there is one, it is so subtle as to escape our observation. If the expressions mean the same thing, both of the questions which have been presented here, have been settled so long, and are so well recognized by every reporter and every elementary writer, that it is altogether useless to enquire, whether they were correctly settled. In *Cro. Eliz.* 48, it was decided, that a promissory note or bill payable *on demand*, was due immediately, as it was founded

edent debt or duty ; and that no request need be alleged :laration on such note. This was considered so well itively settled that when *Saunders*, in the case of *Birks* et, 1 *Savn.* 32, was urging the difference between the re a promise was made to pay a precedent debt, and a sum, upon request, *Twisden*, Judge, interrupted him " what makes you labour so, the court is of your opinion, latter clear."

he promise to pay on demand, is founded on a precedent due immediately. So an action may be commenced ely. The statute of limitations gives no longer period years on notes not witnessed, and fourteen years on notes within which an action may be commenced. In *Collins* ing, reported in 3 *Salk.* 227, and 12 *Mod.*, it was held roper plea to a declaration on a promise to pay on de- s "*non assumpsit infra sex annos*," because the cause of rued from the time of making the promise, and not from nd, which was unnecessary. In *Buller's Nisi Prius* e cases are recognized, and, indeed, it necessarily fol- the doctrine, that an action may be commenced imme- i such a note, that the statute of limitations will run in six n the date of the note. The decision of the county court barge to the jury was right, and in accordance both with and precedent. The law being so established, the ken by the county court in excluding the evidence of- s also correct. From the view already taken, the evi- the loss of the note would have been of no avail to the nd was wholly irrelevant.

i been necessary for the plaintiff to have proved a de- vious to commencing his action, as it would have been nise were to do a collateral thing, which would create no ty unless demanded, the defendant might have pleaded e of limitations, and relied upon the presumption, ari- the lapse of time, that a demand had been made more ears before the commencement of the action. In such id to rebut such a presumption, the evidence offered by dant might have been material. But as no such de- s necessary in this case, nor was the defendant driven to ch presumption, but, on the contrary, the cause of ac- ed, and the statute of limitations commenced running, date of the note, the evidence was improper, and was rejected.

judgement of the county court is therefore affirmed.

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JOHN HARDING *vs.* HENRY N. JAMES.

Where goods were sold, which were not in the possession of the vendor at the time, but in the possession of a third person, who was notified, and consented to keep them for the vendee, it was held that the sale was not fraudulent, though there was no actual change of possession.

Where the vendor, in such case, had authority from the vendee to sell or to let the goods, and he accordingly sold a part, and let the residue, and received payment therefor, it was holden that such acts of the vendor were not evidence of fraud.

This was an action of trespass for taking and carrying away certain pot-ash kettles and a hogshhead. Pleas, *not guilty*. The plaintiff claimed title to the potash kettles by virtue of a sale from one Alvin House. The defendant justified the taking by virtue of a writ of attachment in favor of Southwick, Cannon and Warren, against said House. It appeared in evidence that in July, A. D. 1826, House owned the kettles which were then in his ashery, at Montgomery; that about this time the kettles were taken by Thomas H. Campbell, sheriff's deputy, on a writ of attachment in favor of Runnels and Hunt, against House; that when the kettles were attached they were taken out of House's ashery by Campbell, and put upon the land of one Upham, in the road, about five or six rods distant from House's ashery, and were receipted by Upham, at the request of House, to Campbell. In September, 1826, Runnels and Hunt obtained a judgement in said suit against House; on which execution was issued, and, soon after, delivered to Campbell for collection, who took the kettles thereon, and advertised them for sale: but while he had the execution he informed House, if he would get some person to sign a note with him, payable to Runnels and Hunt, he would take it in satisfaction of the execution. On the 25th day of December, 1826, House went to Kelleyvale, where the plaintiff then resided, and sold to him the kettles, in consideration of his signing a note with House to Runnels and Hunt, for the amount of the execution, being the sum of 120 dollars, and agreeing to pay the same: which note Campbell received of House in full satisfaction of the execution; and the same was paid by the plaintiff in December, 1828, amounting then to about 140 dollars. At the time of the sale of the kettles to the plaintiff, they were in the possession of Upham, and soon after, in the same December, the plaintiff informed Upham, he had bought the kettles, and requested him to keep them for him until he called for them; and he kept them accordingly until April, 1827, when House showed him a line from the plaintiff directing House to sell or rent the kettles for him



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the best advantage. About the 25th of March, 1827, the plaintiff told Upham that he might use one of the said kettles to make sugar. On the 10th of April, 1827, the plaintiff wrote to House, and desired him to sell the kettles, if he could, otherwise, rent them to the best advantage for him. House immediately replied to Upham, and told him that he was directed by the plaintiff to sell or rent the kettles, and informed him he must pay him, the said House, for the use of the kettle, which he had previously used the licence so given by the plaintiff; and Upham afterwards paid to House two dollars for the use of said kettle. About the 11th or 12th of April, 1827, House who then owned and occupied a dwelling house, store and ashery, from which the kettles had previously been taken by Campbell, at Montgomery, all situated within a few rods of each other, rented the ashery with the leaches, troughs, pans, tools, and apparatus, to one Sherman, to make potash, for a certain sum per ton for the use of said works; and also rented to him the kettles; and Sherman then took the kettles, and put them into the ashery, and used the ashery and kettles together for two or three weeks: he then left the kettles in the ashery, where they remained until August, A. D. 1828, when they were attached and taken by the defendant as the property of House. Sherman paid to House five dollars for the use of the kettles. After Sherman had done using the kettles, House rented one of them to one Rand, and Rand paid House for the use of it five dollars. In April, 1828, House sold one of the kettles, one not of those now in question, to S. B. Upham, for 45 dollars, and took a note for the same, payable to the plaintiff; and at the same time House rented said ashery, with the leaches, troughs, pans, tools and apparatus, and the kettles, then being in the ashery, to the said S. B. Upham, for the purpose of making potash, it being then understood that the kettles were the property of the plaintiff, that House acted as his agent in letting them, and that the pay for the use of them was to go to the plaintiff. Upham occupied and used the ashery and kettles from the time they were rented to him until August, 1828, and was in the occupation and use of them at the time the kettles were attached by the defendant; after which he paid House ten dollars for the use of the ashery, and twenty dollars for the use of the kettles. House testified that, in letting and using the kettles, he acted as agent of the plaintiff, and was to account to him for what pay he received.

The plaintiff proved he bought the hogshead filled with whiskey of Justin Fuller, and placed the same in the possession of House,

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at his store in Montgomery, to sell the whiskey by retail, on his, the plaintiff's, account ; that at the time the defendant was attaching the kettles, he told House he had attached the hogshead. House then stated to the defendant, there were a few gallons of whiskey in the hogshead, and requested the defendant to let the hogshead remain a few days [until the whiskey was emptied ; to which the defendant then assented, and directed House, when the whiskey was out, to set the hogshead out at the store door. A few days after this, House emptied the hogshead, and set it out at the store door, according to the direction of the defendant, where it remained until after the commencement of this suit ; and the defendant had not at any time, either before or after the commencement of the suit, intermeddled with said hogshead in any other way than as above stated, and by returning it on the writ as attached by him.

The defendant's counsel requested the court to charge the jury, that the plaintiff left the kettles in possession of House under such circumstances, that they were liable to be attached by the creditors of House, and that the facts proved by the plaintiff could not make the defendant liable in an action of trespass for the hogshead. But the court charged the jury, that as the kettles had been attached by Runnels and Hunt, and taken and advertised for sale on the execution, and the plaintiff gave his note in satisfaction of the execution, and in consideration thereof the kettles were sold to him by House, they would consider the sale valid as against the attachment made by the defendant, if they believed House acted as the agent of the plaintiff in renting the kettles, and the sale was without fraud, or intent to avoid the rights of House's creditors ; it appearing that at the time of the sale the kettles were in the possession of one of the Uphams, who had notice of the sale, and kept them for the plaintiff until Sherman took them, and put them into the ashery under the letting to him, and at the time of the attachment by the defendant, were in the possession and use of the other Upham, and under the letting to him. The acts of House, however, in relation to the kettles, being instructed by the plaintiff to sell or rent them, and take payment for the use, were evidence to be weighed by the jury with the other facts in the case, in determining whether the sale was merely colorable, or was in fact fair and *bona fide*. The court further charged the jury, that the facts proved in relation to the hogshead would enable the plaintiff to recover for it ; and that the measure of damages

would be the value of the property at the time it was attached by the defendant. A verdict was returned for the plaintiff.

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The defendant excepted to the charge of the court; whereupon the cause was removed to this court.

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WILLIAMS, J., delivered the opinion of the Court. The jury have found that there was no actual fraud in the sale under which the plaintiff claims the property for which this suit was brought. They must have found that there was a sale; that it was made upon adequate consideration, and that what was done by House, was done by him as the agent for the plaintiff. The only question then is, whether, from the facts, the defendant was entitled to a charge from the court that the sale was fraudulent *per se*. The principle which has been adopted by this Court heretofore in relation to those sales which had been adjudged to be fraudulent in law, is no doubt a very salutary one, and one from which we feel no disposition to recede. We consider it a principle of the common law, and in every way well calculated to secure the interest of creditors, and to protect them against any attempt on the part of their debtors to defraud them of their legal and just rights. We must, however, take the principle as we find it given to us by the decisions of judicial tribunals. And as we have no wish to relax the rule, so we are not at liberty to extend it to other cases, or, in other words, to make a new rule of law which has not heretofore been adopted or contemplated.

The principle is, that in every absolute sale of chattels, if the vendor remains in possession, and has the control of them as before the sale, the sale is fraudulent in law and void; that in every sale of personal property, except a sheriff's sale, there must be a substantial and visible change of possession, or the law will declare it void; that every officer attaching goods or chattels must take them into his actual custody and possession, or they will be liable to a subsequent attachment by any other officer. But it has also been decided that the principle does not extend to the case of a sale of personal property which was not in the possession of the vendor at the time, but in the possession of a third person, who was notified of the sale, and consented to keep the property for the vendee. This was decided in the case of *Barney vs. Brown*, 2 *Vt. Rep.* 374; and is in conformity with the decisions of the English reports, where the former principle in relation to sales fraudulent in law, is recognized. It is upon the ground that the vendor has neither the actual nor constructive possession, and is divested of all control over the property sold.

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If the decision made in the case of *Barney* against *Brown* is adhered to, it is decisive of the present case. The goods when attached, in the first instance, were taken out of the custody and possession of the vendor, and put into the hands and possession of one Upham. House exercised no control over them, nor could he have any control of the same. While thus in possession of Upham the sale was made to the plaintiff. Upham was notified of the sale, and consented to keep the goods for the plaintiff, and did accordingly keep them for him for the period of four months, when House, as the agent of the plaintiff, and for his benefit, used them in the manner set forth, but never used them as his own, or exercised any control over them, as an owner. Without, therefore, making a new rule of law, and extending the principle heretofore adopted to cases not within the mischief intended to be remedied, and to a length inconvenient and embarrassing, we cannot say that the sale was fraudulent, or that the court should so have charged the jury. It never was, and never should be, understood that a sale attended with all the circumstances which the law requires to render it good and valid, shall be avoided, if the property at any distance of time, and under any circumstances, shall be found in the custody of the former vendor, and under such circumstances too, that no one can be deceived or defrauded. The court in this case considered that the acts of House, the vendor, were proper to be taken into consideration by the jury, as evidence of actual fraud, and so directed the jury, who have found that no such fraud existed.

The charge has been objected to because the judge told the jury, that if House, in what he did, acted as the agent of the plaintiff, the sale might be valid. It would have been objectionable if the jury had been instructed that the fact of the vendor's remaining in possession, as agent of the vendee, would take a case out of the rule of law in relation to those sales which are void. But such was not the instructions to the jury. Here was a sale, which, agreeably to all the rules heretofore adopted, was good in its inception, and remained so for more than four months. The attention of the jury was then properly directed to the consideration of the acts of House after that period, and whether he acted as agent or owner on the question of actual fraud. If House was the owner in fact, the plaintiff's case was at an end, and the defendant was justified in taking the goods as his property. If he acted as owner with the knowledge of the plaintiff, it was evidence to be considered by the jury that the sale under which the plaintiff

claimed was fraudulent in fact: but if he acted merely as the agent of the plaintiff in taking charge of the property for his benefit, at that distance of time from the sale, and did not appear ostensibly as the owner, it did not affect the previous valid sale to the plaintiff. We think the case was properly left to the jury, and see no legal ground for disturbing the verdict.

The judgement of the county court must, therefore, be affirmed.

*Smith & Royce*, for plaintiff.

*Smalley & Adams*, for defendant.

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JOHN H. BURTON vs. JONATHAN BRUSH.

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In an action of *assumpsit* on promissory note, commenced before a justice of the peace, and appealed to the county court, a plea in offset in two counts, one in *assumpsit* on simple contract, and the other in debt on judgement, was held, on demurrer, to be sufficient.

This was an action of *assumpsit* on a promissory note, for two dollars and seventy-five cents. It was commenced before a justice of the peace, and on the trial by the justice, the defendant pleaded in offset twenty dollars, for goods sold and delivered to the plaintiff, and also a judgement recovered by defendant against the plaintiff, for two dollars and ninety-six cents. The justice rendered judgement for the defendant, and the plaintiff appealed to the county court, where the defendant filed the following plea:

*Franklin county court, September Term, 1830.* And now the defendant in court appears, pleads and says, that he did not assume and promise in manner and form as the plaintiff in his declaration hath alleged; and of this he puts himself on the country for trial.

And for further plea, the defendant says, that the said John H. is indebted to him, the defendant, in divers large sums of money for this, to wit, that, whereas, heretofore, to wit, on the 1st day of March, 1830, at St. Albans aforesaid, the said John H., being indebted to the defendant in the sum of twenty dollars, for goods wares and merchandize, before that time, by the defendant, sold and delivered to the plaintiff, at his, the plaintiffs, special instance and request; and being so indebted, he, the said John H., in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at St. Albans aforesaid, undertook and promised the defendant to pay him said sum of twenty dollars, when he should be thereto afterwards requested, yet the defendant, not regarding his promise so by him made as aforesaid, hath not paid said sum of money, or any part thereof, though often thereto requested, to wit, on the 2d day of March, 1830, at St. Albans aforesaid, but

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so to do hath ever neglected and refused, and still doth refuse ; to the damage of the defendant twenty dollars.

And also for that, whereas, heretofore, to wit, on the 2d day of March, 1830, the said Jonathan, at a justice's court holden at St. Albans, aforesaid, on the 2d day of March, 1830, before William H. Wilkins, justice of the peace, in and for the county aforesaid, recovered a judgement, by consideration of said court, against the said John H., for the sum of two dollars, ninety-six cents, for his costs in that behalf expended ; which said judgement remains in full force, not paid, vacated or discharged ; to the damage of the said Jonathan ten dollars. The defendant, therefore, prays, that said sums of money may be offset against the demand of said John H., and that he, he said Jonathan, may recover the balance which shall be found due him from the said John H., according to the statute in such case made and provided."

The plaintiff demurred to the plea, and assigned the following special causes of demurrer, to wit : " 1st. That the subject matter set forth in the several counts in the defendant's plea in offset cannot be joined. 2d. The defendant in the second count in his plea in offset does not allege that the plaintiff is indebted to the defendant in any sum of money, and that he concludes to the damage of the defendant. 3d. The said plea in offset in other respects is vague, uncertain, &c."

The cause having been decided in the county court on the foregoing plea and demurrer, was brought to this Court on a case reserved, where, after argument,

WILLIAMS, J., delivered the opinion of the Court.—This action was originally commenced before a justice of the peace, and must be determined on the true construction of the justice act.

The defendant has pleaded an offset in a declaration of two counts, one in assumpsit, and the other debt on judgement, to which the plaintiff has demurred. The 12th section of the justice act secures to the defendant in an action, when the plaintiff is indebted to him by bond, bill, note, book or other contract, the right to plead the same in offset, and provides that judgement shall be rendered for such sum as shall be found in arrear from either party. Hence, if the action is debt on judgement, a sum due on note, book or bond, may be pleaded in offset, and *vice versa*, if the action is on note or bond, a sum due on a judgement may be pleaded in offset.

If there is any technical difficulty arising from the rules of pleading, in the application of the provisions of the statute, it is our duty to give effect to the statute. The forms and rules of pleading

must yield to the statute, and not the statute to forms. Such, however, is the course of practice in actions before a justice of the peace, that no difficulty will be found in carrying the provisions of the statute into effect, while the action remains before the magistrate. It is only when the cause comes into the county court by appeal, where the claim and the defence have to be presented by pleadings in the usual form, that the difficulties which have been suggested by the plaintiff, if they have any foundation, can occur. We are called to the inquiry, whether in a plea in offset, a count in debt, and one on simple contract, can be joined. The objection urged is, that the pleas are different in their nature and require different trials before different tribunals. The same difficulties, however, will occur, when the demands to be offset are of a different nature. If the action is debt on judgement, and the plea in offset is an assumpsit; if the action is covenant, and the offset is debt on judgement or assumpsit, the pleas would be liable to the same objection, and if it is well founded, we shall be driven to the conclusion, that in actions of debt on record, specially, or simple contract, or actions of assumpsit, or covenant, nothing can be pleaded in offset, but demands of a similar nature. This conclusion would wholly destroy the beneficial object intended by the statute; and if this resulted from the rules and forms of pleading, as I have already remarked, it would be our duty so to alter them, as to give effect to the statute. In our statute of offsets, which regulates the proceedings in actions commenced before the county court, it is said, that the plea shall be in the nature of a declaration, in one or more counts, and so must the plea or notice of setoff under the English statute. *Saunders* and *Chitty* both say, that the subject of the setoff must be stated nearly in the same manner as in a declaration. It is considered as so far in the nature of a declaration of one or more counts, that if one part or count be bad, and another good, a general demurrer to the whole cannot be sustained. On examining the forms of pleas in offset in *Chitty's pleadings*, we find a form consisting of one demand on a recognizance, and another on simple contract, and others on money counts, and also the form of a replication of *nil tiel record* to that part of the plea on the recognizance, and *nil debet* to the residue of the plea on simple contract, and tendering an issue to the country on that part of the plea. *Saunders*, in his treatise on pleadings and evidence, says, that such should be the replication; and it appears to be sanctioned by what fell from the court in *Solomons vs. Lyon*, 1 *East*, 369. We can see no difficul-

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ty in practice, in determining the rights of the parties on all the counts, whether in the declaration, or in the several counts of the plea in offset. Those counts which terminate in an issue to the court must be determined by the court; and when all the issues of law are determined, the jury will assess damages, find the issue joined to the country, and render a general verdict against the party in arrears, agreeably to the directions of the statute. As the same objections against the joinder of these two counts, will be equally fatal to a plea of any demand in offset, of a different nature from the one set forth in the declaration; as the English authorities countenance the practice of joining counts of a different nature in a plea of offset; and as the statutes which must regulate these proceedings seem imperiously to require it, we are led to the conclusion, that the objections to the plea for misjoinder of counts in debt and in assumpsit, are not well taken. And as one of the counts in the plea is unexceptionable, the judgement of the county court was correct in deciding the plea sufficient.

It is of no consequence for us to consider the objections to the other count, as from the view already taken, the judgement must be for the defendant. As an original declaration this count is unquestionably liable to many objections, and would not stand the test of a demurrer. Whether it may not be considered as so far in the nature of a declaration, as to be good as a plea in offset, may be a subject of more doubt. Some deviations from the established forms may be necessary in a plea of offset. But this is a question which it is not necessary for us to determine. The cause will have to be remanded to the county court for the assessment of damages on the plea in offset, and also for the trial of the issue. This ought to have been done before the cause came here. Indeed, the cause is not regularly before the court, as there is no judgement of the county court completed, for us to affirm or reverse. But as this was not noticed until after the cause was argued, and as the parties requested a decision on the demurrer, we have considered it and determined it as above.

*Smith*, for the plaintiff.

*Hunt & Beardsley*, for the defendant.

## EPHRAIM BEARDSLEY vs. JOHN KNIGHT.

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It is a question of law for the court to decide what constitutes a seal; but it is for the jury to determine whether that, which the court adjudges to be a seal, has been affixed to an instrument.

A seal, such as is required to a deed conveying land, must be of wax or wafer, or some adhesive substance which is capable of receiving an impression.

A new trial will not be granted to a party plaintiff on account of the court's having improperly rejected testimony, when it is evident that, in case of a recovery, judgment must be arrested for the insufficiency of the declaration.

One cannot, merely by entering into possession of land, and claiming it as his own, avail himself of the covenants in a deed of conveyance of the premises previously executed by the covenantor to an intervenient possessor.

Where one sues for a breach of covenants running with the land, he must prove a legal assignment to himself, by the covenantee or his assignee, by deed of warranty, having all the requisites of a deed of conveyance, and on failing to prove such assignment or conveyance, all other evidence is irrelevant, and must be rejected.

This was an action of *covenant*, and the declaration contained two counts. The first alleged that the defendant and one Elijah Hyde, deceased, on the 3d day of March, 1808, for the consideration of eighteen hundred dollars, by deed of that date, duly executed, acknowledged and recorded, according to law, conveyed to Ebenezer Hatch, his heirs and assigns, the undivided half of a certain piece or farm of land, lying in the town and county of Grand-Isle, to wit, the first division lots drawn to the rights of Thomas Tolman, Samuel Herrick, and John Wood; and that the said *Knight* and Hyde, in and by said deed, covenanted to and with the said Hatch, his heirs and assigns, that they would warrant and defend the premises against all lawful claims and demands whatsoever;—that afterwards Hatch by deed dated November 20, 1812, for a valuable consideration, quit-claimed the south half of said premises to the plaintiff, including the south part of the aforesaid lot drawn to the right of John Wood; by virtue of which the plaintiff entered into possession, and became seized and possessed of the premises, as assignee of the said Hatch;—that Reuben Clapp, administrator of one Alexander Gordon, afterwards, on the 26th day of January, 1822, sued out a writ of ejectment against the plaintiff, demanding the seizin and possession of thirty six acres of the east corner of said lot, drawn to the right of John Wood; and such proceedings were had in said action, that in January, 1826, the said Clapp recovered judgment in said action against said *Beardsley* for the seizin and possession of the premises demanded, with one cent damages, and his cost, taxed at \$112,52; and afterwards took out a writ of possession, and by virtue thereof he entered upon, and took posses-

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sion of, the demanded premises, and dispossessed said *Beardsley* of the same ; and averring that the title on which the said Clapp recovered was elder and better than the title derived from said Knight and Hyde by said Hatch, and independent of the same.

In the second count the conveyance by Knight and Hyde to Hatch, was set out as in the first. It was then alleged that, on the 8th day of July, 1807, Knight and Hyde conveyed the undivided half of the premises, to the plaintiff, by virtue of which conveyance the plaintiff entered into possession ; and after the execution of the deed by Knight and Hyde to Hatch, as before mentioned, Hatch also went into possession of an undivided half of the premises ; whereby the plaintiff and Hatch were seized as tenants in common, and so continued, until the 20th day of November, 1812, when they made partition of the premises, by which the plaintiff became seized and possessed of the south half thereof in severalty, and of thirty six acres on the south part of the lot drawn to the right of John Wood, and so continued seized and possessed, until the eviction by Clapp, as mentioned in the first count.

The plaintiff claimed to recover of the defendant the value of the thirty six acres from which he had been evicted by Clapp, and all the cost and charges to which he had been subjected in defending the said action of ejectment.

The defendant pleaded that he had kept and performed his covenants according to the form and effect of the said indenture of said covenant. On which plea, issue was joined. On the trial in the county court, the plaintiff insisted the burden of proof lay on the defendant to make good his plea. But the court decided that the plea was a general denial of all the material allegations in the declaration, and put the plaintiff on proof of every material fact alleged. The plaintiff then offered in evidence the deed set forth in his declaration from Knight to Hatch, which was read without objection ; and the deed from Hatch to himself, dated the 20th of November, A. D. 1812, acknowledged on the same day, and recorded on the 9th day of October, 1813. This deed had no seal affixed to the signature of the grantor, excepting a scroll or circle made with a pen, and the word "seal" written within it. The defendant objected to its admission, and insisted that it was not sealed, and, therefore, could not be given in evidence to the jury. The plaintiff insisted that it was sealed, and offered, in connexion with it, parol evidence to prove, that he went into possession of the premises therein described, under it, in 1812, and continued in possession under it till 1829, when he was evicted as set forth

in his declaration, and that whether the deed was sealed or not, was a question of fact for the jury. The court determined that the deed was not sealed, and that whether it was sealed or not, was a question of law for the court to try, and not the jury; and, therefore, excluded it. The plaintiff then offered a quit-claim deed from Knight and Hyde to himself, dated in 1807, of one equal undivided half of the same premises included in the deed from Knight and Hyde to Hatch; and tendered evidence to prove that the plaintiff, under his deed from Knight and Hyde, and Hatch, under his deed from the same, occupied said premises from 1807 to 1812, as tenants in common; that in 1812, Hatch and the plaintiff made a division of the premises, and continued ever after to occupy and enjoy the same in severalty under said division; that by said division the land mentioned in the declaration was set apart to the plaintiff; and that he held and occupied the premises as his own, under said division, from 1812 till the time of the eviction, mentioned in the declaration. Which deed and parol evidence were objected to, and excluded by the court, who directed the jury to return a verdict for the defendant; which they accordingly did. To the several decisions of the court the plaintiff excepted, and the cause was ordered to the Supreme Court.

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*Smalley and Adams, for plaintiff.*—The first question in this case is, what is in issue by the pleadings?

The declaration sets forth the defendant's covenants with Hatch, and the plaintiff's right to them in the character of assignee of Hatch, and then alleges a special breach by ouster, by title elder and paramount to defendant's. To this defendant pleads that he has *kept* and performed his covenants; and on this plea issue is joined. The decision of the county court that this plea was in the nature of a general issue to the whole declaration, was erroneous.

The language of the plea is to be taken most strongly against the party pleading; and it is a universal rule of pleading, that whatever is traversable, and not traversed by the adverse party, is admitted. Now this plea does not expressly deny any fact set forth in the declaration. By it the defendant undertakes to show affirmatively that he has *kept* and performed his covenants; and it would be a strange perversion of all the logic of pleading, as well as repugnant to common sense, to say, that the defendant had *kept* and performed his covenants, because he denied their existence and the assumed character of the plaintiff. This plea cannot be

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made good but by showing that the defendant's title conveyed to Hatch was elder and better than that by which the plaintiff was evicted. This is the only point in issue, consistent with the established rules of pleading. It is no answer to say that the plaintiff could not show a breach of the covenant, without establishing his right as assignee to the premises from which he was ousted. This is a mere *petitio principii*, assuming the very point in controversy. The question is, whether the plaintiff's character, as assignee, is admitted or denied by the plea; not what the plaintiff, under another state of the pleadings, *might* be compelled to prove to make his case. The plaintiff insists, that the plea admits the making of the covenants, and impliedly his right to sue for their breach, but argumentatively denies the eviction by title paramount. This interpretation restricts the plea to a single point, and renders its language consistent with the general canons of pleading and the adjudged cases.—*Comyn's Dig. Pleader C*, 49, *E*, 26; *Archbold's Pleadings*, 191–2, 237, 239, 275–9, 280; 7 *Petersdorf*, 400; *Hodgson vs. E. In. Co.* 7 *T. R.* 278; *Corsbie vs. Oliver*, 2 *C. L. R.* 303; 1 *Tidd's P.* 593; *Roosevelt vs. Heirs of Fulton*, 7 *Cowen*, 71, and authorities there cited; *Stephen on Pleading*, 157, *et sequente passim*, *Rules of pleading*.

II. Was the deed from Hatch to plaintiff sealed? And 1st. This is a question of fact which should have been submitted to the jury under the direction of the court. Generally, whether a deed or other instrument offered, is genuine, is a question for the jury. This proposition is too well established to admit illustration as it respects signature.—2 *Coke Lit.* 232. 2nd. If the question must be tried by the court alone, it is submitted, that the deed from Hatch to the plaintiff was sealed. The primitive use and purpose of the seal have long since ceased; and affixing it to an instrument can now only be considered a mere formal ceremony. Originally it appears to have been used as a substitute for writing, and for the purpose of identifying the party by an appropriate sign. It was not generally, in the early periods of its use, impressed upon the instrument or upon wax or other substance, but was attached to a label of parchment, or a silk string, fastened at the bottom of the instrument which it was intended to authenticate.—2 *Evans' Poth.* 18; 2 *B. C.* 305; *Jacob's Dic. Seal*; *Crabb's History of E. L.* 92. In the reign of Edward I. every person of note had *his seal*, or, more properly speaking, instrument, with which he probably impressed upon wax or other substance the figure or character to which he was en-

titled, and by which he was known. Hence the question so often agitated in the ancient books, whether a man could seal with a stranger's seal, and whether several obligors could bind themselves by making several impressions upon the same piece of wax. As late as 29th *Eliz.* this seems to have been *vexata questio*; and it was held in the exchequer, that several could not seal on one piece of wax, but there must be several pieces. In all the discussions on this subject in the ancient books, it seems to be assumed that the act of sealing was performed by an instrument with which the obligor stamped or imprinted his peculiar sign. But none of the old books contain any adjudication or discussion upon the precise point of what material the seal should be composed. The discussion would seem to be frivolous and impertinent; for it can hardly be supposed the law ever ordained that a person should authenticate an act by performing certain ceremonies, and by using a certain specific material substance, without which, let his intention be ever so manifest, the deed should be invalid: neither the ancient nor modern authorities warrant such an inference. The history of this mode of authentication shows that it has been gradually and imperceptibly modified by fashion and the character of the periods in which it has been used. Before the knowledge of letters and the art of writing became so generally diffused, affixing a seal to an instrument was undoubtedly a solemn act performed with proper ceremony. But it never was considered more than evidence of intention, and in modern times it has dwindled into secondary evidence. Thus it was held in a modern case "that the putting of a seal opposite the name, notwithstanding it was evidence of a deed, and one of the formalities attending it, was not to be taken as conclusive evidence, provided the intention of the parties was not to contract by deed." The law says that a conveyance of land to be valid shall be *signed and sealed*, but has not declared of what material the seal should be composed, and the only knowledge we have of its composition is historic. At different times different materials have been used in its composition, and different ceremonies performed in the act of prefixing it, which tradition, practice, and the double import of the term seal sufficiently prove. Modern writers of reputation lay it down as universally conceded, that, "to constitute sealing, the use of wax or wafer is not essential. It is sufficient if the *seal*, stick, or other instrument, be impressed by the party on the plain paper or parchment with an intention to seal." In conformity with this description of a seal have been the

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adjudications and practice in most of the states throughout the union. This interpretation of *sealing*, though not perhaps strictly according with ancient practice, is perfectly consistent with the fact, that it has become secondary to signing, and but a mere ceremony. The deed under consideration appears to have been executed by the parties having the same idea of a seal which is entertained by the most enlightened tribunals and approved legal writers of the day. The grantor, Hatch, at the time of the execution of this instrument, affixed to it what he called his seal, and acknowledged it to be his deed: the plaintiff received it as such, and it remains to be seen whether the law will give effect to this acknowledged and declared intention of the parties.—2 B. C. 306, citing *Stat. 14, E. 1*; *Church vs. G* 5 *Esp.* 83; *Comp. Stat.* 167; *Math. P. E.* 39; *Shep. Touch.* 57; *Atherly's notes*; *Sugden on Powers*, 236; 2 *Evans' Poth.* 143-44; *U. S. vs. Caffin*, *Br. Rep.* 140; *Cox Dig.* 608; 4 *Cruise's Dig.* T. 33, C. 2, s. 72.

III. From the fact of 17 years possession, the jury ought to have presumed that it was duly executed.—*Sumner vs. Child*, 2 *Con.* 610; *Brown vs. Woodbeck*, 2 *Con.* 27; *Gray vs. Gardner*, 3 *Mass.* 399; 1 *Swift's Dig.*; *Saunders P. & E.* 282; *Math. P. E.* 6, 10, 11, 14, 37, 38.

IV. Admitting the deed to be defective, still, as the plaintiff has acquired the land, he has acquired the covenants, which run with the land. The covenant of warranty runs with the land to heirs and purchasers.—4 *Cruise's, Dig. T.* 32, c. 25, s. 26, 22, 67; *Spicers case*, *Coke abr.* 135.

V. The evidence offered by the plaintiff was pertinent to the issue upon the second count, and ought not to have been rejected. If the count does not set forth a good title in the plaintiff it should have been objected to by demurrer.

*Mr. Allen, for the defendant.*—The question is, whether the deed of Ebenezer Hatch to the plaintiff is void for want of a seal, there being, in place of a seal, merely a scroll, with the word "seal" inscribed. Defendant contends there is no seal, and the deed is, therefore, void. The seal required by the common law is defined by *Lord Coke*, (3 *Inst.* 169) to be "*cera impressa, quia cera sine impressione non est sigillum.*" In all the eastern states the waxen seal has been required. In Delaware, Virginia, Illinois, Missouri, and Tennessee, the scroll with L. S. has been substituted by statute, and in Pennsylvania by long usage, sanc-



tioned afterwards by the courts. (5 *Binney*, 238.) But upon the same question coming up in New-York, *Chancellor Kent* very decidedly condemned the use of such a substitute. (5 *John. Rep.* 239, *Warren vs. Lynch*.) And he has more lately express his opinion with equal decision in his commentaries. (*Vol. 4, p. 444*.) He shows, that the seal was not used "because it helped to designate the party who affixed it to his name," but was intended to fix the attention of parties more effectually, as well as to serve as the principal means of distinction between writings sealed and writings not sealed. (5 *Johns.* 246 ; 4 *Kent's Com.* 445.)

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The defendant contends, that the use of a scroll as a substitute for the waxen seal, ought not to be adopted by our courts. Because, 1st. It has no countenance from our statute, which (*p. 167*,) requires that deeds must be signed, sealed, and delivered &c. to be valid. Now if the Legislature had designed to vary the common law, would they have re-enacted the common law essentials of deeds word for word? 2nd. It tends to abolish the important distinctions which have so long obtained between specialties and simple contracts. *Chancellor Kent* considers, that "it is in effect abolishing seals, and, with them, the definition of a deed or specialty, and all distinction between writings sealed, and writings not sealed."—(4 *Kent's Com. p. 445*.) 3rd. Such substitute has been decided insufficient, by the Supreme Court, in the case of *Matlocks vs. White*, in Chittenden county, in 1829—not reported. That was an action of covenant broken. The deed was signed, and a scroll with L. S. made in place of a seal. The court, *per PRENTISS, C. J.*, decided the deed to be void. And in *Stevens vs. Dewing*, (2 *Vt. Rep.* 411) the principle that a seal is essential to the validity of a deed is distinctly recognized; also in *Arms vs. Burt et al.* 1 *Vt. Rep.* 309.

The opinion of the Court was delivered by

WILLIAMS, J.—The plaintiff has declared against the defendant in covenant. The declaration contains two counts. The defendant pleads performance, and tenders an issue which is joined. It was considered by the county court that this plea put the plaintiff on proof of every material fact in his declaration. The plaintiff contends, that, under this issue, his derivative title was not denied, nor the character in which he sued. But if the plea required the plaintiff to shew a breach of the covenant declared on, and this was not questioned, he must, to shew such breach, prove an eviction of some one holding under Hatch; and

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this made it necessary to prove a conveyance from Hatch to himself. The plaintiff does not sue as assignee, nor in the right of another, as an executor, or administrator, or assignee of a bankrupt, in which case his character as assignee would not be denied under the plea. But he sues as on a covenant made with him, and coming to him with the land, by virtue of a deed from Hatch. The eviction of the plaintiff would be no breach of the defendant's covenant with Hatch, unless plaintiff claimed title to the land through Hatch. Hence it was incumbent on the plaintiff to show a conveyance from Hatch, and this brings in question the validity of the instrument which was offered as Hatch's deed to plaintiff. It seems that it was objected to, and excluded as not having been sealed.

It is first contended by the plaintiff that this was a question of fact, which ought to have been submitted to the jury. This will not bear examination for a moment. It would be submitting to the jury to say, whether writing the word seal, does in law constitute the instrument, to which it is affixed, a sealed instrument. The court must always determine whether an instrument offered in evidence has the legal requisites to make it evidence; and although the parties may call a writing, without any seal, a deed, and offer it in evidence as such, yet the court must adjudge that it is *not* a deed. When the court have determined what constitutes a seal, the jury may then say whether it is affixed to the instrument. If the court correctly determined that a seal should be of wax or wafer, it would then be a question of fact for the jury, whether it was placed on the instrument; but if there was no pretence that a wafer or wax, or that which the court considered essential to constitute a seal, had ever been impressed on the paper offered, then it was a question of law for the court to determine whether that paper was a deed. The county court were correct in determining this question, and excluding the paper from the jury, if they were right in determining that it was not sealed. The question then arises, what constitutes a seal, and was the instrument offered sealed? It was incumbent on the plaintiff to show that writing the word "seal" at the end of his name, constituted a seal, especially as it is against the common received opinion. It would be sufficient, to decide the point, to say that no authorities have been or can be produced from the common law of England, or from the decisions of our own courts, establishing this as a seal. The definition of a seal, or sealed instrument, is as well understood as the definition of a written instrument. A learned

and elaborate argument has been made, and reference has been had to legal and classical writers, to shew the origin and use of seals. Possibly there is some dispute as to the origin, and too much consequence may have been attached to them. Perhaps, the whole distinction between sealed instruments and those not under seal, may savour of the learning of former times, and possibly if a system of jurisprudence was now to be formed, the whole distinction might be abolished. But the distinction is so interwoven with every branch of the law, and presents itself to us in so many parts, both of the statute books and the books of the common law, and is so well understood both by the learned and unlearned, by the lawyer and his client, that it would be worse than useless to attempt to abolish it to accommodate a particular case. It is a question which will seldom arise in this state.

Whether any definition can be given of a seal which would be sufficiently accurate to embrace every case, is unimportant. As to deeds, charters, &c., it has always been understood the seal must be of wax or wafer, something which may be impressed with an instrument used as and for a seal. Corporations act by their seal, and public documents are evidenced by a seal. In these last cases the impression of the seal may be made directly on paper without the intervention of the wafer or wax, as it is the particular impression made by the stamp which is recognised as the public seal of the corporation or public office. Possibly, some other substance may be found which will answer the purpose of a seal, as well as wax or wafer. But merely writing the word *seal* will never be in general use. It can never be adopted either for a common or public seal. The decision of Chief Justice *Kent*, in the case of *Warren vs. Lynch*, 5 *John.* 237, and his remarks in the 4th volume of his commentaries, (page 444,) are perfectly conclusive on the question, and are as much distinguished for sound common sense, as for legal learning. Further, we learn that this question has been determined by the Supreme Court of this State in a cause decided in Chittenden County, between *Mattocks* and *White*, which is not reported. In those states where a scroll or flourish of the pen or circle of ink has been adopted, it has been effected either by statute, or by long usage. Such may be the law in those states; but it is not in this state, either by force of the common law or by statute. The instrument, therefore, offered in evidence as the deed of Hatch, was not a deed or conveyance of land, as it wanted one of the essential requisites to constitute it a deed. The paper from Hatch to the plaintiff, having been rightly excluded by

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the court, there is no other ground on which the plaintiff can recover of the defendant on the covenants contained in the defendant's deed to Hatch. The argument that the plaintiff was in possession, and, therefore, might avail himself of the covenant as running with the land, is wholly destitute of foundation. His possession, as against Hatch, may have been adverse, so that he was acquiring a title by the statute of limitations as against him; but if so, it would be, at least, singular, if he could acquire a title as against Hatch by a trespass, and, at the same time, by the same trespass, acquire a right to Hatch's claim against the defendant on the covenants in his deed. Although a deed from Hatch to the plaintiff might under some circumstances be presumed, yet, as presumptions are made to quiet men in possession, I do not know that it has ever been contended before, that they would create a right of action on the deed presumed. A deed might be presumed to give a legal origin to a possession; but an instrument not under seal cannot be presumed to be a deed for the purpose of giving an action of covenant thereon, or an action of covenant on a deed farther back in the chain of title. It seems that the plaintiff had a quit-claim deed from the defendant and Hyde, dated 8th July, 1807, of one undivided moiety of the land in dispute. If he was not in possession under that deed, he was in without title, and can have no claim upon the defendant if he has not kept his covenant with Hatch, for the other moiety of the same premises. It is said the evidence on the second count was excluded by the court. This count appears to be decidedly bad; and although the court may have erred in excluding the testimony altogether, and the regular course might have been to have admitted the testimony, leaving the defendant to move in arrest, or bring his writ of error, yet this court would not, on that account, grant a new trial, when we should be under obligation to arrest the judgement thereon on account of the insufficiency of the declaration. But it will be observed, that notwithstanding the pleader in framing the declaration avoided any distinct reference to the instrument which purported to be a deed from Hatch to the plaintiff, which was excluded as not being sealed, yet, to avail himself of the covenant made with Hatch, and entitle himself to shew the eviction as a breach of that covenant injurious to him, he declares that he was possessed of the part of which he was evicted, as assignee of Hatch. To support this count, therefore, it was necessary for him to show a legal assignment from Hatch, and if he failed to introduce a regular deed from Hatch to himself, the

count would fail for want of proof. This count, therefore, as well as the other, depended upon the validity of Hatch's conveyance to the plaintiff; and that being excluded, all other testimony was irrelevant, and was properly rejected. If neither Hatch nor his grantee were evicted from the premises, the plaintiff has not become liable on his covenant to Hatch. If the plaintiff was evicted from his undivided part, he is without remedy at law, as his title to an undivided moiety was nothing more than a quit-claim deed from the defendant and Hyde, on which he has not set up any claim; and his title to the other moiety was under a writing from Hatch which the Court consider as no legal conveyance. On every view which we have been able to take of the case, we can see no remedy for the plaintiff at law; and the judgement of the county court must be affirmed.

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Judgement affirmed.

SILAS P. DEAN vs. HEMAN LOWRY.

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It is the duty of the jail commissioners to give notice to the creditor before admitting the debtor to the oath prescribed for poor debtors, if there be an agent duly appointed on the execution; and if they omit to do so, their proceedings are irregular and void, and their certificate, on which it appears that no such notice was given, is no justification to the sheriff in permitting the debtor to depart.

If there be an attorney of record in a suit residing in the county where the debtor is confined, whose name is endorsed on the execution, he is an agent within the meaning of the act passed November 7th, 1820, relating to poor debtors, and must be served with notice of the prisoner's application to the commissioners to be admitted to the oath prescribed for poor debtors.

Where the surname, only, of an attorney was endorsed on the copy of an execution, it was held to be sufficient to apprise the debtor, commissioners and sheriff, that there was an attorney or agent on the execution, living in the county, agreeably to the provisions of the statute.

This was an action for an *escape* against the sheriff of Chittenden county for permitting one LeGrange to escape from prison. The declaration alleged that on the 30th day of April, 1824, the plaintiff recovered a judgement against LeGrange for \$30, damages, and \$8,89 cost; that the plaintiff afterwards took out an execution on said judgement dated August 20th, 1824, and delivered the same to the constable of Huntington, in Chittenden county, where LeGrange then was; who afterwards, on the 16th day of October, 1824, committed said LeGrange to prison in Burlington, in said county; and that Lowrey, the defendant, then sheriff of said county, and keeper of said jail, voluntarily permitted LeGrange to escape. The defendant pleaded the general

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issue, and gave notice in writing, agreeably to the statute, "that on the trial of the said issue he should rely upon and give in evidence the following special matters, to wit: That after the commitment of the said LeGrange, as set forth in the plaintiff's declaration, and before any departure from prison of said LeGrange, he, the said LeGrange, was admitted to the benefit of the several laws then in force, relating to poor debtors, by taking the oath therein prescribed; and thereupon obtained from the commissioners of jail delivery, within and for the county of Chittenden, a certificate in the words and figures following:

"State of Vermont, Chittenden county, ss. To Heman Lowry, Esq., keeper of the jail in Burlington, in said county, greeting. Whereas, Omri LeGrange, a prisoner in your custody, on an execution at the suit of *Silas P. Dean*, of Franklin, in the county of Franklin, and state of Vermont, for the sum of \$30 damages, and \$8,89 cost, signed by Solomon S. Miller, justice of the peace, and dated the 25th day of August, A. D. 1824, has this day taken the oath prescribed in an act relating to levying executions and to poor debtors; the said *Dean* not having been duly notified, did not attend, and in our opinion the said Omri LeGrange ought to be discharged; there being no agent on the execution.

"Given under our hands, at Burlington, the 16th day of October, A. D. 1824."

"David Russell, }  
"Jno. Peck, } Commissioners."

That one copy of this certificate was delivered to the said Omri, and another copy was lodged with the jailer; after which the said Omri did leave the jail, and go at large, whithersoever he would; which is the same escape complained of by the plaintiff in his declaration against the defendant."

The parties afterwards agreed to the following facts: That the plaintiff had recovered judgement against LeGrange, and caused him to be committed to jail, as set forth in the declaration; that the plaintiff resided in Franklin, in the county of Franklin, and LeGrange resided in Richmond, in the county of Chittenden; that David French, Esq., who was the plaintiff's attorney in procuring said judgement, and who endorsed his name on the back of the execution as attorney, was an attorney in practice at Williston, in the county of Chittenden; that on the day on which LeGrange was committed, he made application to the jail commissioners in due form of law, to be admitted to the oath prescribed for poor debtors; that the commissioners thereupon on the same day administered the oath to him, without any notice to the plain-

tiff, or to French ; that they thereupon made out their certificates in the form before mentioned, and delivered one to LeGrange, and lodged another with the jailer ; and that LeGrange on the same day left the jail. It was further agreed that on the original execution there was endorsed, "D. French, att'y.;" and on the copy left with the jailer, there was endorsed, "French, att'y."

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On this statement of facts the county court rendered a judgement for the defendant, and the case was reserved for the opinion of this court. After argument by counsel,

WILLIAMS, J., delivered the opinion of the Court. The defendant in this action is sued for the escape of one Le Grange, who was a prisoner in his custody at the suit of the plaintiff on execution. It appears that Le Grange was discharged out of custody by the defendant, on receiving a certificate from the commissioners of jail delivery in the county of Chittenden, on the same day on which he was committed. The certificate of the commissioners is in the form prescribed in the statute, except they do not certify that the creditor was duly notified ; but they certify that he was *not* duly notified, and assign as a reason, "there being no agent on the execution." In this there is a departure from the form given in the statute ; and in their proceedings, the plaintiff contends, there has been such a departure from the requirements of the statute that they are inoperative and void. It is a general principle which applies to all judicial tribunals, and especially to those of a limited or inferior jurisdiction, that no persons are bound by their proceedings unless they have actual or constructive notice. Their jurisdiction over the person is generally acquired by the notice they give, and where this notice has not been given, their proceedings have been held to be irregular and void.

At the last term of this Court in Addison county, we were called on to decide, and did decide, that a judgement of a court of record in a neighboring state, rendered against a defendant to whom no notice was given, and who had not submitted to their jurisdiction by appearing, was a void judgement. In this case we are to inquire whether it was the duty of the commissioners to notify the plaintiff previous to their admitting LeGrange to the oath ; or whether it was a case in which they could proceed to admit him to the oath without notice, according to the statute of 1820, "entitled an act for the benefit of poor prisoners;" and if it was their duty, and they omitted it, whether the defendant was justified in discharging a prisoner from his custody on receiving a cer-



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tificate from them, which, upon the face of it, carried the evidence that they had not given this notice.

By the 12th section of the general act in relation to jails and jailers, it is made the duty of the two justices of the peace, on application of an imprisoned debtor, to issue a citation to the creditor; and the different modes in which the citation may be served are pointed out. The duties which by that act appertained to the justices, have since been transferred to a board denominated commissioners of jail delivery. Under this act the justices or the commissioners could in no case admit a debtor to what is called the poor debtor's oath, without giving notice to the creditor. The form of the certificate is, that the creditor "was duly notified." But inasmuch as they must certify the fact, that notice was given, and, as they are constituted the judges whether the notice was regular, their decision in the certificate has been held to be conclusive of the fact of notice, and that it could not be questioned elsewhere. But notwithstanding the directions of the statute were so positive as to the duty of giving notice, yet from the words of the 12th section of the act relating to levying executions, (*Stat. p. 214,*) some doubts were formerly entertained, whether the statute last mentioned did not control the other; and a practice obtained in some parts of the state of admitting debtors to the oath without giving notice. This practice was founded upon a misconstruction of the law, and was decided to be wrong by the Supreme Court of this state in 1815. In the case of *Adams vs. Mattocks*, reported in *Brayton*, 199, it was decided that the citation must be served on the creditor, if within this state, though no agent is appointed on the execution; and if this was not done, and no notice given to the creditor, the jailer was liable for an escape if the defect appeared on the face of the certificate lodged with him. This was decided after great deliberation, by a court highly respectable, and who would not willingly have subjected a sheriff to unnecessary hazard or accountability.

Judge PRENTISS, in giving the opinion of the Court in the case of *Bennet vs. Morrill*, recognizes the accountability of the sheriff in such case, and, in speaking of Morrill's being admitted to the oath without notice, says, as this appears upon the face of the certificate there can be no doubt, if notice is by law necessary, that the discharge was irregular and void. Of the correctness of this opinion, fortified as it is by the decision before referred to in the case of *Adams vs. Mattocks*, there can be no doubt.

The obligation on the justices as commissioners to give notice was peremptory by the general act. They had no discretion or opinion to give, whether notice was necessary or not; nor is this discretionary power given them by any subsequent acts; nor is it a subject on which they are to adjudicate and judicially determine. The act of 1820, which was in force when this escape was suffered, as well as the subsequent act of 1824, provided, that in certain cases, unless an agent is appointed on the execution, the debtor shall not be obliged to give notice to the creditors, but may forthwith be admitted to the oath. But these cases are pointed out by the statute, and whenever they occur, the duty of the commissioners is as much fixed and determined as in the other cases; and if they refuse to admit to the oath without giving notice, in a case where notice is not necessary, they may be compelled so to do by *mandamus*. There may have been some doubts from the wording of the statute in what cases notice was dispensed with, and possibly different persons might have put a different construction upon the act itself; but in such cases the debtor, commissioners, and sheriff, must each judge for themselves, as they always must when a duty is required of them by law, and at the hazard of having their opinions reversed by the regular judicial tribunals. But it is not submitted to the commissioners as a question to be judicially decided on by them. If it was, their decision might be final and conclusive. In all cases of proceedings by tribunals of limited jurisdiction, every person affected by them must see that their proceedings are not irregular and void. It is to be remarked that this certificate was not in the form given by the statute. It contained on the face of it evidence that notice had not been given, and, of course, should have put the sheriff upon the enquiry, whether notice was necessary. That part of the certificate, which stated that there was no agent, was unnecessary; is not in the form given in the statute, nor was it required. The fact itself is one which they were not called upon judicially to decide or certify; and that part of the certificate is only giving the reasons of their proceedings. The defendant was under no obligation to regard it; and further, had the evidence in his own hands to which he could resort to determine whether the agent was appointed or not. We come then to this conclusion, and are all agreed in it, that it was the duty of the commissioners to give notice to the creditor before admitting the debtor to the oath, if there was an agent duly appointed on the execution, and if they omitted to do it, their proceedings were irregular and void, and their certificate on which

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it appears that no such notice was given, would be no justification to the sheriff in permitting the prisoner to depart.

The remaining inquiry will be whether there was such an agent appointed on the execution as the statute of 1820, before referred to, requires. On this point we are equally clear and unanimous. In the case of *Bennet vs. Morrill et al.* 2 Vt. Rep. 322, it was decided, that if there was an attorney of record, and his name endorsed on an execution, he was an agent within the meaning of the statute of 1820. Although that case was determined on the ground that there was no such agent appointed, and might have been determined without considering this question, yet it seems that this was the point made in argument; that the attention of the Court was bestowed almost exclusively upon it; and it cannot be disregarded as an extra judicial opinion, as the defendant's counsel contend. The opinion of the Court was given by Judge PRENTISS, and was clear and perspicuous, its reasoning forcible and irresistible, and it must be regarded as an authority strictly in point in this part of the case.

Without the authority of that case, we should have considered that the question is clear, and should so decide were it *res integra*.

It appears that David French, Esq. was the attorney who prosecuted the suit; that he was an attorney in practice in Williston, by which we understand an attorney regularly admitted and sworn, and authorized to appear in suits in the courts in this state; and we know there is a gentleman of that name in Williston who is a regular practising attorney. Mr. French was, therefore, the attorney of record of the plaintiff. By attorney of record we understand the one who appears in the suit, either for plaintiffs or defendants, and by whom the parties are said to appear by the record. In justice's courts, as well as in the higher courts, appearance by attorney is recognized, and the appearance should be so stated in the record, if the facts warrant it. The name of French was endorsed on the back of the execution as the attorney, and according to the authority of the case before named, he was the agent of the plaintiff on whom the notice should have been served when the debtor applied to be liberated from prison as a poor debtor.

It has, however, been insisted on, that the christian name of the attorney was not inserted in the copy of the execution left with the jailer; and it has been said that there are several persons of the name of French, in the county of Chittenden. There may be several of the name of David French; but the case does not

disclose that there is any person in that county of the name of French, who is an attorney, except the one who was the attorney for plaintiff ; and the addition of attorney was a sufficient designation of the person. Indeed, we cannot for a moment suppose that there was any mistake or doubt in the mind of either Le-Grange, the debtor, the commissioners, or the defendant, as to the person who was attorney for the plaintiff. Their error probably arose from a misconstruction of the statute of 1820, in supposing that the attorney of record was not the agent contemplated by that act ; but that an agent must be specially appointed notwithstanding there was an attorney of record in the county. It is not unfrequently the case that there may be several persons of the same name residing in a county ; but if there was only one who was an attorney, and who was named as such, could there be any doubt as to the person intended ? The name of "French, att'y," indorsed on the copy, was sufficient to apprise the debtor, commissioners and sheriff, that there was an attorney or agent on the execution living within the county, agreeable to the provisions of the statute in that behalf ; and to inform the commissioners that it was necessary to give him notice before administering the oath to the debtor, and the sheriff that he must not permit the debtor to escape on receiving a certificate on which it appeared that no notice was given to such agent or attorney, or to the creditor.

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If the case had disclosed facts from which we could justly infer that there was so much uncertainty as to the person of the agent appointed, that the commissioners or debtor could not determine to whom notice was to be given, we might consider that there was no sufficient appointment ; but the case does not disclose any such facts, and we cannot but be sensible that any such presumption would be unfounded. The judgement of the county court is reversed, and judgement must be entered, that the plaintiff recover his damages ; and the cause must be remanded to the county court for the assessment of damages, if either party requires a jury.

*Burt and Smalley & Adams, for plaintiff.*

*Allen and Hunt & Beardsley, for defendant.*

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JOSEPH PHELPS vs. NATHAN PARKS.

Where a judgement was rendered in a suit against the defendant who was out of the state at the time the suit was commenced, and no notice had been given him except by publication in a newspaper, and the plaintiff, after entering into a recognizance in double the sum recovered in damages, without including the costs, took out an execution, and levied it on the lands of the judgement debtor,—it was held that the execution was not void, and that the plaintiff acquired a valid title to the land by the levy.

Where the plaintiff in *ejectment* claims the premises by virtue of the levy of an execution, and the defendant is a stranger to the title, and does not claim under the execution debtor, he will not be permitted to call in question the correctness of the judgement and execution by virtue of which the plaintiff claims title.

This was an action of *ejectment*, in which the plaintiff claimed title to the premises demanded by virtue of the levy of an execution in favor of the plaintiff against Joseph Phelps, jr., issued on a judgement rendered in Grand Isle county court, April term, A. D. 1828, for the sum of fifteen hundred dollars damages, and costs taxed at twenty nine dollars and fifty-five cents. It appeared that the judgement was rendered on default, the defendant being gone to parts unknown. On trial the defendant's counsel objected to the admission in evidence of the record of the execution and levy, without the plaintiff's first showing that bonds had been given, by way of recognizance, to refund and pay back such sums as might be adjudged against the plaintiff on a writ of review. The court decided that the bond must be produced. It appeared on inspection, that the bond had been taken by the clerk, before the execution issued, for three thousand dollars only. The defendant's counsel objected to the bond on the ground that the amount thereof was not double the amount of damages and costs of the judgement rendered. The court decided that the bond and execution were insufficient and void, and that the plaintiff acquired no title to the land in question by virtue of the levy, and accordingly, ordered a verdict for the defendant. To which decision the plaintiff excepted, and removed the cause to this Court for revision.

After argument, the opinion of the Court was delivered by,

WILLIAMS, J.—In this action the plaintiff claims title under the levy of an execution in his favor against Joseph Phelps, jr. The defendant shows no title; but attempts to impeach the judgement and execution under which the plaintiff claims.

The judgement, on examination of the files and records in the clerk's office, appears to be in every respect regular, and is not liable to any of the objections which have been taken, to wit, that

the auditors had not notified the parties of the time and place when they should hear, examine and adjust, the accounts of the parties. If this had not appeared to have been regular, the judgement on which the execution issued, would not on that account have been void. The court had jurisdiction of the parties and of the action by the service of the writ, and the subsequent proceedings had to give notice to the debtor. If they improperly accepted the report of the auditors, or if the auditors proceeded irregularly, their proceedings, or the judgement rendered thereon, might have been set aside, but would not be void.

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The principal point on which the county court rendered judgement against the plaintiff, was the alleged irregularity in issuing the execution. The judgement was for fifteen hundred dollars, damages, and twenty nine dollars, fifty-five cents cost. The debtor having been out of the state, both at the time of the service of the writ, and at the time when judgement was rendered thereon, and not having any notice of the suit, except by publication, no execution could lawfully issue, until a recognizance was taken from the plaintiff, in pursuance of the statute. The statute is, that when judgement shall be rendered by default, against a person who has not had personal notice of the suit, execution shall not issue, until the plaintiff shall have given bond by way of recognizance in double the value of the estate, or sum of money recovered, to make restitution, &c. The bond of recognizance, which was taken, was in the sum of three thousand dollars only. The defendant contends that it should have been in the sum of three thousand fifty nine dollars, ten cents, double the amount of the damages and cost, for which judgement was rendered against Jos. Phelps, jr.

If the views of the defendant were correct in relation to the requirements of the statute, the execution which issued in this case would not be void ; but would be and remain good against all persons until set aside for irregularity.

In Connecticut, under a statute similar to ours, it was decided in the case of *Marcy vs. Russ*, (1 Root, 176,) that an execution, issuing in a case like the one under consideration, was not void ; but a levy on lands by virtue of such an execution conveyed a good title. This decision is recognized as law in that state by *Chief Justice Swift*, in his digest, (p. 154.) The case of *Johnson vs. Harvey*, (4 Mass. 483,) under a like statute in Massachusetts, is an authority to the same effect. The cases of *Farnham vs. Morrison*, (2 Ld. Ray. 1138 ;) *Johnson vs. Lascre*, (Ld. Ray.

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1459, and 2 *Strange*, 785;) *Young vs. Shaw*, (1 *D. Chip.* 224,) show, that a recognizance may be good at common law; though not strictly in pursuance of a statute. This recognizance then was an adequate and sufficient security for Jos. Phelps, jr., the debtor in the execution, though it should be considered as not exactly made in conformity to the statute.

But we are strongly inclined to believe, that this recognizance, was in compliance with the statute. The case of *Dixon vs. Dixon*, (2 *Bos. & Pu'll.* 443,) is an authority for the construction contended for by the plaintiff.

The statute of *James I. c. 8*, provides, that no execution shall be stayed by a writ of error, unless the person in whose name the same shall be brought, with two sufficient sureties, shall be bound by recognizance in double the sum adjudged to be recovered by the former judgement.

In the case above mentioned it was adjudged, that a recognizance entered into by two sureties, without the principal, and also in double the amount of the sum *recovered for debt*, without regard to the costs, and nominal damages, was good under the statute; and a writ of error with no other recognizance, than the one above mentioned, was held to be a supercedeas to the execution. The court observed, that the practice had been invariably such, without objection, and it was too late to overturn it. On another ground, the court would have felt themselves compelled to reverse this judgement.

The defendant is a stranger to the title; he does not claim under Jos. Phelps, jr., and cannot object to the judgement and execution. The original debtor, for aught that appears, is satisfied with the judgement, with the issuing of the execution, and with his security; and why should the defendant be permitted to make any difficulty between the plaintiff in this suit, and the person against whom he recovered judgement? This alone was sufficient to induce us to reverse the judgement of the county court. The other points decided were principally relied on, in the argument; and it was necessary for us to decide them, if the defendant at any future trial should connect his claim with the title of Jos. Phelps, jr.

The judgement of the county court must  
be reversed, and a new trial granted.

*Allen & H. Adams*, for plaintiff.

*Smalley & Adams and Brown*, for defendant.



ADMINISTRATOR OF JOHN COLLARD vs. THADDEUS TUTTLE. CHITTENDEN,  
January,  
1832.  
(In Chancery.)

Where one by contract in writing had bound himself to convey certain lands which he had bid off at vendue,—it was held in a bill in chancery brought by the other contracting party to compel him to a specific performance, or to pay over what he had received on the sale of the lands, that the statute of limitations was a good plea.

But in such case the statute does not begin to run till after a demand made ; and after a great lapse of time it will be presumed that such demand has been made.

The bill alleged, that on the 19th day of November, 1806, and for some time before, the orator, B. Boardman and A. Welch, (both of whom were dead,) owned three lots in Westford, no. 40 in 1st division, containing 50 acres, no. 49 in 3d division, containing 100 acres, no. 20 in 4th division, containing 75 acres, all belonging to the right of David Dickson ; that at a vendue known as Hazeltine's vendue, on the 25th Nov., 1805, for the non payment of a tax of two cents per acre on lands in Westford, defendant bid off the three lots; that the orator, Boardman and Welch, paid defendant the money paid by him, and the interest, and that *Tuttle* executed to them a written agreement on the 19th November, 1806, stating that he had bid off the lots in question at the vendue above mentioned, on the 25th November, 1805 ; that the orator, Boardman, and Welch had paid him the amount of his bids, and 12 per cent. interest thereon, and promising to release to them, or their order, all the title he had acquired by his bids, provided the bids were not redeemed, on demand, and repay to them the money received, if the land should be redeemed, or, on failure, to pay all damages sustained. The bill further stated, that the land was not redeemed ; that the orator, Boardman and Welch, so divided their interest in the lands, that lot no. 49 was assigned to orator ; that *Tuttle*, on the 17th February, 1807, released lot no. 40 to one Melvin Barnes, by order of the orator, Boardman and Welch ; that Boardman died intestate in 1825 ; that no administration had been granted, and that Welch removed to parts unknown many years since, and died leaving no legal representatives ; that *Tuttle*, on the 21st February, 1824, without the knowledge or consent of the orator, Boardman or Welch, conveyed said lot no. 20, by deed of warranty, to J. Hobart, and received therefor, \$90,00 ; that the orator on the 13th day of December, 1826, tendered to *Tuttle*, to be executed, a quit-claim deed to the orator, of lot no. 49 ; and had, as had also, at other times, both Boardman and Welch, requested him to quit-claim to them lots no. 49 and 20, which defendant had always refused to do.

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*Prayer*, that defendant might be decreed to quit-claim to orator, for his benefit, and that of the representatives of Boardman and Welch, all the right and title he acquired to lots 49 and 20, by virtue of said vendue purchase ; that if he had received any thing for lot no. 20, he might be decreed to pay it with interest to the orator ; or that he might be decreed to quit-claim to orator his right so acquired to lot 49, or to pay its value ; and for general relief.

The defendant pleaded the statute of limitations.

**WILLIAMS**, Chancellor, delivered the opinion of the Court.—The bill charges, that a written contract was made by the defendant, on the 25th day of November, 1805, binding him to do a specific act, viz. to deed certain lands which he had bid off at vendue, if they were not redeemed, and he acquired a title thereto ; or to pay the money received for the redemption, if they were redeemed ; or, on failure, to pay all damages. To this bill the defendant has pleaded the statute of limitations.

A suit at law to recover damages for the breach of this contract would be barred in six years from the time the defendant was required to perform the same, and neglected so to do. Courts of Equity are bound by the statute of limitations ; and it is regarded in a court of equity, as well as in a court of law, as running upon all legal titles and demands. The statute does not in terms mention equitable demands ; yet equity adopts and takes the same limitation in cases that are analogous to those, in which it applies at law.—*Stackhouse vs. Barnstown*, 10 *Ves.* 453. Courts of equity regard the statute, and give it the same construction, when the cases are similar, as courts of law. Hence the statute of limitations is a good plea in bar of a bill of equity, as well as of a suit at law, where it is brought for a legal demand.

In the case now before us, there is no trust, which required length of time for its full execution, nor is any fraud charged, which was undiscovered until within the period of six years, before bringing this bill ; but it is charged that a contract was made by the defendant, which could have been enforced, at any time after the 25th day of November, 1806, either by requiring a specific performance, or by an action at law to recover the damages sustained on account of the non-payment of the same.

The plea of the statute of limitations must be allowed in this case, as it is, if true, a full defence and bar to the orators claim.

But as no cause of action would accrue on this contract either

at law or equity, until a demand was made of the defendant, so the statute of limitations would commence running from the time of the demand.

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Whether the orator can resist the presumption that such demand was made more than six years anterior to the filing this bill, arising from the great lapse of time since the defendant could have been compelled to perform his contract, is for him to determine, as he will be at liberty to traverse the plea; but the plea must be allowed.

*Allen and Bailey & Marsh*, for orator.

*Adams*, for defendant.



ADMINISTRATOR OF BENJAMIN SEYMOUR *vs.* ROBERT BEACH  
AND MARTHA MILLER.

CHIT  
Jan  
1:

A letter of administration from a probate court signed by the register, or a certificate of administration attested by the register, is sufficient and proper evidence to show that the person named therein has been appointed administrator.

Where an officer levying an execution on land did not state in his return that the appraisers were resident *in the town* where the land was situated,—it was held that the levy was not thereby void, the officer having pursued a form which had been long followed and extensively practised upon.

In an action of ejectment, by one who claims under the levy of an execution, against one who holds under a deed from the execution debtor, made prior to the levy, such debtor cannot, by reason of interest, be a witness for the plaintiff to prove that the conveyance to the defendant was fraudulent.

But the plaintiff, though he sues as administrator of the levying creditor, may render the witness competent, by discharging him from any liability on the judgement, which might arise in case the plaintiff failed to recover.

And a witness under such circumstances is not disqualified, on the ground of public policy, from impeaching the validity of his conveyance.

This was *ejectment* for a house and lot, in the village of Hinesburgh. Plea, *not guilty*, and trial by jury. To support the issue on his part, the plaintiff offered in evidence a letter of administration issued from the office of the probate court in the district of Addison. The defendants objected to the admission of the same, because it was signed by the register only, and not by the judge of probate; and also because it did not appear to have been recorded. The court overruled the objection, and the paper was admitted. The plaintiff also offered a certificate of his appointment as administrator, signed by the register; to which defendants objected, as being improper and insufficient evidence of the fact; but the court overruled the objection, and the paper was admitted. The plaintiff, in order to prove title in his intestate,

CHITTENDEN offered in evidence the record of a levy of an execution, in favor  
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 Seymour's adm made on the 30th day of May, A. D. 1820, which was as fol-  
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" CHITTENDEN, ss. *Hinesburgh, May 30, A. D. 1820.*

Know all men by these presents, That I, John Norton, constable of Hinesburgh, within and for the county of Chittenden, by virtue of an execution within mentioned to me directed, having first made demand of goods or chattels to satisfy the same, together with my fees, and none being shewn to me, or found within my precinct, by direction of *Benjamin Seymour*, the creditor within named, did, at Hinesburgh, in said county, on the 30th day of May, of the year of our Lord one thousand eight hundred and twenty, levy this writ of execution on a certain piece or parcel of land, shown unto me by said *Seymour*, as the property of *Harvey H. Lawrence*, the within named debtor, situate, lying and being in Hinesburgh aforesaid, and bounded and described as follows ; [Here the premises are particularly described.] And afterwards to wit, at Hinesburgh aforesaid, on the day and year last aforesaid, I caused the same land, with the appurtenances, to be appraised by *William B. Marsh*, *Jedediah Boynton*, and *Mitchell Hinsdell*, good and lawful free-holders of the vicinity, chosen, appointed, and sworn, as the law directs, who, on oath, have appraised the same at three hundred dollars ; which, after deducting the legal cost thereon arising, as stated in the bill hereunto annexed, leave two hundred and ninety dollars and fifty seven cents, to apply on this execution. And on the same day and year last aforesaid, I caused the said writ of execution, together with my return thereon, to be recorded in the town clerk's office of Hinesburgh aforesaid, and also to be recorded in the office of the clerk of Addison county court. In witness whereof I have hereunto subscribed my hand and affixed my seal, the year and day above mentioned.

*John Norton, constable."*

To this record the defendants objected. 1st. Because it did not appear that the officer made any sufficient previous demand of money, goods or chattels, to satisfy the execution. 2nd. Because the manner in which the appraisers were appointed, did not sufficiently appear, and because it did not appear that they were resident in *the town* where the estate was situated. These objections were overruled by the court, and the record of the levy was admitted. The defendants then offered to prove by parol that the officer did not make any previous demand upon the debtor of money, goods or chattels, to satisfy the execution ; but the evidence was rejected by the court. They also gave in evidence a deed of the premises, from *Lawrence*, the judgement debtor, to the defendant, *Beach*, dated September 10th, and recorded Septem-

ber 13th, 1818, previous to the levy or attachment in favor of the <sup>CHITTENDEN,</sup> intestate. This conveyance was successfully impeached by the <sup>January,</sup> plaintiff by proving that the same was fraudulent as against the <sup>1832.</sup> creditors of Lawrence, and that the intestate was then a creditor, <sup>Seymour's adm</sup> for the same debt on which the judgement and execution afore- <sup>rs.</sup> said were founded. The witness to prove the fraud, was Lawrence himself, to whose competency the defendants objected; but the objections were overruled by the court, and the witness was admitted. The defendants being proved to be in possession at the commencement of the action, the jury returned a verdict for the plaintiff, and judgement was rendered thereon. To the several decisions aforesaid the defendants excepted. Whereupon the cause was removed to this Court.

*Mr. Adams, for the defendants.*—1st. Harvey H. Lawrence was improperly admitted to testify as a witness in the cause. He was directly interested. He was in effect paying a debt to the amount of the levy by his own evidence. If he could avoid the previous deed, then Lawrence's debt was paid. If he could not, then *Seymour* would be entitled to his alias execution.—*Bland vs. Ansley, 2 New Rep. 331.* It is against the policy of the law to allow any one to impeach his deeds. The interest of parties would be in the utmost jeopardy if after having executed a deed the maker could impeach it. The acknowledgement of a deed is matter of record, and the party ought not to be allowed to contradict it.

2nd. The proof of plaintiff's authority, as administrator, was not sufficiently made out. Plaintiff's authority in this case was matter of title, and the power under which he acted should have been shown. It is like the case of a conveyance to the party when the original must be shown. In other cases secondary evidence may be admitted; but here the original was necessary.

3rd. The levy of the execution was void. *Firstly.* It does not appear that the officer made any demand of the debtor of the damages and cost in the execution. The statute is imperative, that such demand shall be made, and it is ~~only~~ on the refusal of the debtor to pay, that his property can be taken. *Secondly.* It does not appear that the officer made any application to the debtor to appoint appraisers. The law gives to debtors as a high privilege, the right to appoint, at least, one of the appraisers, and it can never be taken from him. It was so ruled in the case of *Stanton vs. Bannister, 2 Vt. Rep. 464.* *Thirdly.* It does not appear by

**CHITTENDEN** the officer's return, in what manner the appraisers were appointed  
*January,* or sworn. In legal proceedings which divest persons of their  
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 Seymour's adm property, it is necessary that the utmost provisions of the law are  
 vs. complied with. It is not sufficient for the officer to assert that he  
 Beach et al. has proceeded legally : he is to set forth in detail what he has done,  
 and the court will determine upon its legality. Nothing can be  
 presumed. Nothing can be taken by intendment. Plaintiff must  
 show a strict compliance with all legal requisites. Whatever is  
 required of the officer must appear substantially in his return ;  
 otherwise his proceeding is irregular. *Fourthly.* It does not ap-  
 pear that the appraisers were free-holders of the *same town*. The  
 law requires not only that they must be of the vicinity, but also of  
*the town*. This is another of the requisites that the statute makes  
 essential. The officer does not give their residence, and the  
 Court cannot presume it.

*Thompson and Sawyer, for plaintiff.*—1. The character in  
 which the plaintiff sues is admitted by the plea. Where an executor  
 or administrator brings an action in his representative capacity, he  
 makes profert of the letter of administration ; and if the defendant  
 means to dispute his right to sue in the representative character  
 which he assumes, he must do so by plea in abatement, and can-  
 not make the objection under the plea of the general issue, or any oth-  
 er plea in bar. Such plea puts in issue the cause of action merely,  
 and not the character in which the plaintiff sues.—7 *Mod. Rep.*  
 141 ; 1 *Saund.* 275. no. 3 ; 1 *Salk.* 285 ; 2 *Ld. Raymond,*  
 824 ; 8 *East's Rep.* 187 ; 2 *Esp. N. P. C.* 564. And there-  
 fore the introduction of the evidence objected to, was unnecessary,  
 and the inquiry about its admissibility superfluous.

2. But if pleading the general issue, be not an admission of the  
 character in which the plaintiff sues, the letter of administration  
 is sufficiently proved. The administrator is appointed by the probate  
 court ; but the signature of the register is the proper evidence  
 of such appointment. He is made the certifying officer of the  
 probate court, and his powers, and duties are identical with those  
 of a clerk of the county or Supreme Court. And the certificate  
 given in evidence is expressly made evidence by the statute,  
*p. 333.*

3. The levy, except in one immaterial particular, corresponds  
 with the form given in the appendix to *Nath. Chipman's Rep. p.*  
 264, a form which has been pursued and sustained in this state  
 nearly forty years. Some decisions made in Massachusetts and

New-Hampshire, in regard to the levy of executions, require the officer to state every step taken specifically, and hold that no general expressions can dispense with such specific statement. Those decisions are not binding here : it would be asking quite too much of this Court, to defer implicitly to their authority in regard to the requisitions of a statute of our own. Possibly, the superior wisdom and learning of the present day—were the validity of this levy an original question—might reject principles which were established by *Judge Chipman*, and which have been acquiesced in by our courts and most eminent jurists for so long a period. But the long continued acquiescence in this mode of levying executions proves that no practical inconvenience has resulted from it. On the other hand, to hold the levy in the present case invalid, would endanger every title in the state similarly situated, disturb immense interests, and produce consequences of a magnitude that no man can anticipate, though *any* man can see that they would be of a most disastrous character. To restore symmetry in the law, and harmony with the decisions in other states, would be benefits too slight and unsubstantial to justify the Court in disturbing the settled law of the land on this subject. And, therefore, it is conceived that the validity of this levy is no longer a *questio vexata*. The levy states that the officer demanded “goods and chattels,” instead of “money, goods and chattels.” As *Chipman’s* form did not require *any* demand to be stated, a defective statement of it is immaterial.

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4. The witness, Lawrence, was properly admitted to prove his sale to Beach fraudulent against his creditors. The authority of *Walton vs. Shelly*, 1 Term Rep. 300, has been repeatedly overruled by the English courts and expressly denied in this state.—*Nichols vs. Holgate et al.* 2 Ark. 140.

WILLIAMS, J., delivered the opinion of the Court.—The objections taken at the trial to the evidence offered to prove that the plaintiff was administrator, were manifestly groundless. The letter of administration from the probate court signed by the register, or the certificate of administration attested by the register, were either of them sufficient and proper evidence for that purpose. The first section of the probate act makes the certificate of administration, attested by the register, legal evidence, and as effectual as the letter of administration made out in due form. Moreover, it was decided in the case of *Clapp vs. Beardsley*, 1 Vt. Rep. 151, that under the general issue, the defendant cannot



**CHITTENDEN** deny the representative character of a plaintiff who sues as administrator.  
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The objections also which were taken to the levy of the execution were properly overruled. The levy appears to be in the form given by Judge CHIPMAN in his reports, published in 1793, which has been generally adopted by officers in this state in making their returns of levies of executions on real estate; and although it has frequently been intimated, that if it was a form recently adopted, it might not stand a strict scrutiny, yet it has always been decided to be good, both in the courts of our own state, and in the circuit court of the United States. It cannot now be overturned without disturbing the title of much real estate, holden under levies made in this form. The statute in relation to levying executions on real estate, which was in force when that form was published, is essentially the same as the one now in operation, and in the particular, where it is said, this levy is defective, viz, in not specifying that the appraisers were of the vicinity *in the town* where the estate levied on was situate, the direction of the statutes were precisely the same then as now. As, however, it is an acknowledged principle, repeatedly recognized by the decisions of courts, that to divest the title of a debtor in his real estate, and vest it in his creditor by the levy of an execution, the officer who makes the levy must, in his return, specifically set forth a substantial compliance with all the requisites of the statute, it is evidently unsafe to rely any longer on this form; but those forms of return should be adopted which set forth a compliance with the requirements of the statute in every essential particular.

Another question arises in this case, whether Harvey H. Lawrence was properly admitted as a witness in behalf of the plaintiff. It has been contended by the defendant, that he was directly in interest in the event of this suit, and that it was against the policy of the law to admit any one to impeach his own deed.

On the ground of interest, we think the witness offered ought to have been rejected; and on that account a new trial must be granted.

The plaintiff on the trial was seeking to recover the title and possession of a piece of land which he had taken on an execution to satisfy a debt due to him from the witness. If he failed to recover, and obtain satisfaction of his execution by the levy on the land in question, he could resort to a *scire facias*, and obtain an execution for the debt against the witness. It is apparent, that the witness was directly interested to have the plaintiff recover in this

suit ; and thus have his debt against the witness satisfied. If the land in reality belonged to the defendant, it was clearly for the advantage of the witness to have the plaintiff obtain a satisfaction of his debt from that land.

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It has been urged, however, that as the defendant claimed the land by a deed of warranty from the witness, the witness was indifferent, as between the plaintiff and defendant, and that his interest was balanced. This depends upon the consideration, whether the witness can be made liable to the defendant on his covenant of warranty, if the plaintiff recover in this suit. It is very clear, that if the witness is subject to an action on the covenant it will be on the ground alone that the defendant is evicted from the premises, and not from the fact that a recovery was had against the defendant on the testimony of the witness, as has been contended. It cannot be alleged as a breach of his covenant, nor can it be given in evidence in any action thereon, that the witness testified in the trial of an action of ejectment, in which the validity of his deed was questioned.

I think, however, that the witness cannot be made liable on the covenants contained in his deed to the defendant, in consequence either of the levy of the execution of the plaintiff, or of the plaintiff's recovering in this action, if he should eventually recover, even though such recovery should be had on the testimony of the witness. At the time of this conveyance, the witness was the lawful owner of the land in question ; and had a good title to the same, which he could lawfully convey to any one, who did not unite with him in an attempt to defraud his creditors. The witness, therefore, could not have been subjected to an action at the suit of the defendant, if the plaintiff should succeed in recovering in this case, by proving that the defendant's deed from the witness was fraudulent.

The authorities clearly show that in an action brought by the owner to recover damages for taking property in execution as the property of another, the debtor in the execution, for whose debt the property was levied on, is a competent witness for the claimant, although he may claim by a sale from the witness ; but is not a witness for the defendant in such action, whether he is the creditor in the execution, or the sheriff who levied the same. The case of *Giddings vs. Canfield*, 4 Con. 482, may be referred to as establishing the former position, and the case of *Bland vs. Ansley*, 2 New Rep. 331, the latter.

The witness was directly interested in favor of the plaintiff, as

**CHITTENDEN**, he would be immediately liable in case the plaintiff failed to recover. This was not balanced by any liability which he could be under to the defendant, as the defendant had no claim against him on the covenants of his deed, although the plaintiff should successfully impeach it on the ground of fraud between defendant and the witness, Without adverting to the other ground taken by the defendant's counsel, we are of opinion that the witness was improperly admitted to testify on behalf of the plaintiff, and  
 There must be a new trial.

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This cause was again tried at the county court in Chittenden county, March term, 1831, **WILLIAMS, J.** presiding. The same question in relation to the right of the plaintiff to sue, and his title under the levy, was again raised and decided in favor of the plaintiff. Harvey H. Lawrence was again offered as a witness to show the deed to have been executed without consideration, having been discharged from his interest in the suit by the plaintiff. The release from the plaintiff, by which his interest was discharged, was admitted to be in every respect regular, if the plaintiff had any authority to execute such a one, as would render the witness competent.

The defendants objected to the admission of the witness, contending that the plaintiff as administrator could not discharge the witness; but that he would still remain liable to the heirs of the intestate; and further, that it was against public policy to permit a witness to impeach his own deed on the ground of fraud, or a want of consideration. The objections were overruled, and the witness admitted. Exceptions were taken to the decision of the county court; and a verdict having been rendered for the plaintiff, the cause again came before the Supreme Court in Chittenden county, January term, 1832, for a hearing upon the exceptions, and was argued by *Mr. Adams*, for the defendants, and by *Messrs. Bailey and Marsh*, for the plaintiff.

**WILLIAMS J.**, delivered the opinion of the Court.—The questions as to the letter of administration, and the certificate of the register of probate, to show the right of the plaintiff to sue, and also the validity of the levy of the execution, under which he claims title, were considered and decided at the last term of this Court. It was also decided at the same term, that Lawrence was not a competent witness for the plaintiff, as he was debtor to him; and the effect of his testimony would be to pay his own debt with

the property of the defendant ; and the interest arising from this, was not counterbalanced by any liability which he was under to the defendant, in consequence of his deed to him.

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This decision was made solely on the ground that the witness was interested in the event of the suit, without adverting to the question which has been raised on this argument.

It is not contended but that the release was properly executed, and that if an administrator can discharge the interest of a witness, in a case similar to the one under consideration, this witness was discharged from his interest.

The only liability which the witness was under was this ; that if the execution was not satisfied by the levy, he would be subject to another execution for the amount unsatisfied by the levy. To obtain this, a *scire facias* must be brought by the personal representatives of the deceased, who have the control of all the personal assets including all debts due. The administrator, therefore, was the only person who could discharge the witness from the debt due to the estate. A discharge from the heirs would have been wholly ineffectual. The release from the plaintiff was amply sufficient to discharge the debt, and to extinguish any interest which Lawrence had in the present suit. Considering that the witness was discharged from any interest in the event of the suit, the only question remaining is, whether there is any rule of law founded on considerations of public policy which should exclude this, or any other witness, similarly situated, from testifying to the facts which he was called on to prove.

In general, all persons of sufficient discretion to know the obligation of an oath, of sufficient religious belief to feel its obligation, and who are not infamous, nor interested in the event of a suit, are admissible as competent witnesses.

This is the general rule, and there should be no departure from it, except in a case of evident necessity. If we resort to considerations of public policy in determining who shall, or shall not, be admitted as witnesses, it ought surely to be in a case where the propriety of it is so obvious and apparent, that the mind is irresistibly impressed with the necessity of such resort, to justify a departure from the known and established rule.

In the present case, we can see no reasons at all, arising either from propriety, or the interest of the public, which requires such a departure. So far as regards the witness, or the parties to a transaction like the one in controversy, the impropriety, and, I may add, the immorality, consists in their being parties to a fraud-

CHITTENDEN, <sup>January,</sup> 1832. <sup>Seymour's adm.</sup> <sup>vs.</sup> <sup>Beach et al.</sup> ulent transaction, and not in their disclosing it in a court of justice. And the public interest, if it has any claim, requires that the truth should at all times be disclosed, where any such transaction is the subject of enquiry in a court of justice.

There can be no ground for the distinction which has been urged, that the grantor may be a witness to support a deed, but not to defeat it. Indeed, if we were at liberty, judicially, to legislate on this subject, we should be more disposed to reject him, when called for the former purpose, than for the latter; as all experience shows that fraudulent grantors are much more disposed to shape their testimony to establish, rather than to defeat, a deed executed to defraud their creditors.

The dangers which have been suggested from thus admitting witnesses exist only in the imagination. They assume as their basis, that the grantor becomes dissatisfied with the grantee, and is disposed by perjury and fraud to defeat his title. Whereas, his disposition is usually the other way. But we cannot guard against attempts of this kind by any legislative or judicial determination. All persons are liable to be injured by perjury; but so well calculated is our manner of trial to elicit the truth, that the attempt to injure in this way is usually frustrated, and perjury and fraud are generally met by destroying the credit of the perjured witness, or by contradicting his testimony.

The authorities upon this subject are certainly very conclusive. In the case of *Title vs. Grevett*, 2 *Lord Ray*. 1008, it was decided, that a man who conveys land may be a witness to prove that he has no title. Although some doubts upon this question were expressed by *Judge Sewell*, in the case of *Storer vs. Batson*, (8 *Mass.* 441,) yet after argument and consideration it was decided by the Supreme Court of Massachusetts, in the case of *Loker vs. Haynes*, (11 *Mass.* 498,) that the grantor of a deed, not being interested in the event of the suit, is a competent witness to shew that the deed was fraudulent. A decision precisely similar was made by the Supreme Court of the state of New-York in the case of *Jackson ex dem. Mapes vs. Frost and Haff*, (6 *Johns.* 135.) And the case from 4 *Con.* 482, before referred to, is to the same effect.

The maxim from the civil law, that a witness cannot be permitted to allege his own turpitude, or to disprove an instrument to which he is a party or witness, has long ceased to be recognized, except in a particular case. It will be seen, that to adopt it to the extent contended for, would exclude the subscribing witness to a

will or deed, as well as the magistrate who takes the acknowledgment; and would effectually shut out all testimony, which would tend to elucidate the facts and circumstances attending the execution of the instrument. It is sufficient to say that such a rule has not and cannot be adopted.

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January,  
1832.

Seymour's adm  
vs.  
Beach et al.

We are aware of the decision in the case of *Walton vs. Shelly*, (1 *Term Rep.* 296,) which has been so much pressed and insisted upon in the argument of this case. It will be observed, however, that if the doctrine of that case was recognized, it only applies to the party to a particular kind of written instrument, viz. negotiable notes, and never has been extended further. Both in Massachusetts and New-York, where the law of that case has been fully adopted, it has not been considered as applicable to a case similar to the one under consideration; but from the cases before referred to, decided in those states, it appears that in regard to deeds a rule different, and similar to the one we establish in this case, has been adopted.

Of the case of *Walton vs. Shelly* it may be remarked, that it was an anomaly in the law of evidence—short lived in England—not recognized in this state, but expressly rejected in the case of *Nichols vs. Holgate et al.* (2 *Aik.* 138.).

Whether the case of *Nichols vs. Holgate et al.* would now be overruled or recognized, or whether it ever will be, it is not for me to say. But I presume it will not be overruled until a case is presented which directly requires that it should be reviewed, and the court upon due deliberation should find the law to be otherwise than it was considered to be in that case. We are not now required to review or reverse that decision.

The judgement of the county court must be affirmed.

CHITTENDEN, **HEMAN LOWRY vs. IRA CADY, AND HEMAN LOWRY vs. THADDEUS TUTTLE.**  
January,  
1832.

In an action by an officer against the bailees or receiptors of property attached by him, it is not necessary, in order to prove the attachment, to produce the original writ ; ~~but~~ the fact may be proved by other evidence ; and the receipt, itself, if one has been taken, is the appropriate and proper evidence.

A receipt for property taken on an attachment is considered so far conclusive between the parties, that the person executing the same is not permitted to deny the attachment in a suit brought against him on the receipt.

An exemplified copy of a judgement is the legal and proper evidence to prove the same : neither docket minutes nor records should be received, unless there be very strong reasons for dispensing with the usual and appropriate evidence ; as where the judgement has not been recorded.

This was an action of *assumpsit*, to recover the value of certain personal property which had been attached by the plaintiff, by virtue of a writ of attachment in favor of one Safford Stevens against Thaddeus Tuttle, and, as was alleged, delivered to the defendant upon his receipt in writing for safe keeping. Plea, *non assumpsit*, and issue to the court. To show the attachment of the property, and the delivery of it to the defendant, the plaintiff offered a receipt in writing for the property attached, signed by the defendant, reciting the attachment ; to which the defendant objected ; but the court admitted the evidence. The plaintiff then offered in evidence the files of the court, and the testimony of the clerk, to prove the loss of the original writ and declaration, previous to the term of the court at which a new declaration was filed by order of court ; and also offered evidence to prove that the new declaration was an exact copy of the original writ and declaration, and was for the same cause of action as the original, with some amendments made to the same previous to the loss. To the admission of this evidence the defendant objected ; but the court admitted it. The plaintiff then offered in evidence the files of the county court, and the docket minutes of the judgement, and the issuing of the execution on the same ; to which the defendant objected : but the court, after ascertaining that said judgement was not recorded by the clerk, admitted said files and docket minutes, as evidence of the judgement and execution.

The defendant then contended that, by any alterations and amendments of the original declaration in this case, in any other way than in the form of it, the plaintiff had lost his lien upon the property attached : but the court overruled the objection, and rendered judgement for the plaintiff to recover of the defendant the sum of \$166,93 damages. To which decision and opinion of



the court the defendant excepted ; and thereupon the cause was brought up to this court for a final hearing ; where, after argument by counsel, at the present term,

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Lowry  
vs.  
Cady et al.

The opinion of the Court was delivered by,

WILLIAMS, J.—Both of these actions are brought by the plaintiff, late sheriff of the county of Chittenden, on receipts for property taken on a writ of attachment in favor of Safford Stevens against Thaddeus Tuttle. From the pleadings it appears that both stand on the same foundation ; and a determination of one, must also determine the other.

On examination, we find nothing which requires us to disturb the judgement of the county court. The attachment was sufficiently proved. An attachment of personal property is the taking such property into the legal custody of the officer making the same, by virtue of, and in pursuance of the directions contained in, a writ of attachment. In an action between other parties than the sheriff and his receipters, the writ of attachment, with the official return of the officer, is sufficient evidence of this fact. It has been denied that this is evidence in an action by the officer making return.—*Merrill vs. Savage, 8 Pickering, 397.* We are, however, inclined to the opinion that it is sufficient evidence of the fact of the attachment in any suit. The defendants have contended that this is the appropriate and only evidence of that fact, and that, for the want of that evidence, the plaintiff should have been nonsuited. If the court had coincided with them in opinion on this point, there would be no reason for sending this case to another trial. The original attachment was lost. The secondary proof, which is admissible in such a case, and was admitted in this case, was amply sufficient to prove the attachment, if that kind of proof, alone, was competent for that purpose.

But we are of opinion that the attachment itself, that is, the taking into the custody of the officer, may, in an action between him and his bailees or receipters, be proved by other evidence than the attachment ; and that the receipt itself, when one is taken, is the appropriate and proper evidence for that purpose. A receipt for property taken on an attachment is considered so far conclusive between the parties thereto, that the persons executing the same are not permitted to deny the attachment in a suit brought against them on the receipt.—*Lyman vs. Lyman et al, 11 Mass. 317 ; Spencer vs. Williams, 2 Vt. Rep. 209.*

The writ and after proceedings are not essential to entitle an of

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ficer to a judgement on such receipt, unless they are made so by the declaration of the plaintiff, as they were in this case.

The objection taken to the admission of the docket minutes has been abandoned by the defendants. The Court would remark, however, that it is improper to rely on evidence of this kind. An exemplified copy of the judgement is the legal and proper evidence to prove the same. Neither the records themselves, nor minutes, should ever be received, when copies can be obtained, unless there is some strong reason for dispensing with the usual and appropriate evidence. In this case, as the judgement was not recorded, the court were justified in receiving other evidence of the same than an exemplified copy of the record.

The only remaining question is, whether the attachment was dissolved by the amendment of the declaration. It does not appear by the case here presented, that the amended declaration was for any cause of action different from the original declaration, nor that it varied from it in any essential particular. If the defendant relied on any such variance, he should have pointed out in the case in what the amended declaration differed from the original. This is not shewn here, and we cannot, therefore, say, that the county court made an erroneous decision on this point. This renders it unnecessary for us to inquire, whether any amendments would vacate an attachment as between the parties to the suit, or between them and the officer making the attachment, or between the officer and his receiptors, where there are no other attaching creditors, who are interested in the question; or what amendments or alterations of the original writ would discharge the property taken thereon.

The judgement of the county court is affirmed.

*Bailey & Marsh*, for plaintiff.

*Adams*, for defendants.

## CHARLES F. WARNER &amp; Co. vs. WILLIAM MCGARY.

CHITTENDEN,  
January,  
1832.

Where an action is brought by the assignee of a promissory note against the maker, it is the duty of the payee who has assigned the note, warranting it to be due, and has received notice of the suit, to furnish all the evidence in his power to enable the assignee to recover.

In an action by the assignee of a note against the payee, who had assigned it warranting it to be due, the admissions of a person whose name appeared to the note as the maker, were held to be inadmissible in evidence to prove the execution of the note by him, and thereby defeat a recovery by the plaintiff, on the ground that the supposed maker himself might be called on as a witness.

When a person is living, and is an admissible witness, his declarations, not made under oath, cannot be received in evidence.

This action was brought against the defendant to recover the amount of a promissory note which had been sold and transferred by him to the plaintiffs. The note was as follows :

*" Burlington, July 18, 1827.*

*" For value received I promise to pay to William McGary, or order, the sum of fifty dollars, on the first day of April next, with interest.*

Signed, *Hugh Riddle,  
John Shaughness,  
John Turner."*

The assignment was in these words :

*Burlington, Nov. 24, 1828.*

*" I hereby sell to Charles F. Warner & Co. a note in my favor against Hugh Riddle, John Shaughness and John Turner, all of Burlington, dated July 18, 1827, for fifty dollars, on interest ; and have received the full amount of said Warner & Co. I warrant the note due, but do not risk the ability of the signers to pay.*

Signed, *William X McGary."*  
mark.

On the trial in the county court, it appeared in evidence that the plaintiffs had commenced an action on the note in the name of McGary, against John Turner, whose name appeared on the note as one of the signers ; that Turner defended the suit on the ground that he had signed the note as witness, and not as surety ; that McGary was notified that such defence was set up by Turner, but took no measures to obtain testimony to prove the signature, nor gave the plaintiffs any information where evidence could be procured ; and that on account of this defence set up by Turner, the plaintiffs consented to a nonsuit.

The defendant tendered evidence to prove that Turner, after the note was sold to the plaintiffs, admitted he had signed the note in question with Hugh Riddle and John Shaughness, as surety, and

**CHITTENDEN**, not as a witness, and that he was liable on the note. This evidence was objected to by the plaintiffs, and was rejected by the court; whereupon the jury returned a verdict for the plaintiffs. The defendant filed exceptions to the opinion of the court, and the cause was brought up to this Court on a motion for a new trial.

*January,*  
1832.  
**Warner et al.**  
*vs.*  
**McGary.**

*Mr. Allen, for the defendant, cited Hall vs. Phelps, 2 Johns. R. 45; 2 Stark. Ev. 44, 45; 1 do. 341; \* \* \* \* vs. Williamson, 1 Doug. 93; Abbott vs. Farr, id. 215; Call vs. Demming, 4 East, 55.*

*Bailey and Marsh, for the plaintiffs, cited Phil. Ev. 176, 210; Harrison vs. Blade et al. 3 Camp. 457; Phil. Ev. 38; 3 Johns. Cases, 83; Phelps vs. Winchell, 1 Day's Rep. 270; Shuttleworth vs. Stevens, 1 Camp. 407; Stanton vs. Atkinson, 7 Term Rep. 480; \* \* \* \* vs. Hallett, 2 Caines' Rep. 77; McLeod vs. Johnstons, 4 Johns. Rep. 126; 1 Stark. Ev. 185, 231; Case vs. Reeve, 14 Johns. Rep. 79; Nix vs. Culling, 4 Taun. 17; Hart vs. Horn, 2 Camp. 92; 10 Mass. 397; 7 do. 297; 2 Vt. Rep. 193.*

The opinion of the Court was delivered by,

**WILLIAMS, J.**—To maintain this action, and entitle themselves to a verdict, the plaintiffs must have proved the sale of the note to them by the defendant, and that Turner, who appeared by the note to be one of the makers, was not so in fact, but that he intended to put his signature thereto as a subscribing witness only, and not as a joint promissor. Of the sale and warranty set forth in the declaration, there was no doubt. On the note thus sold, the name of John Turner appeared as one of the signers. To prove that it was not so signed by him, or was not so intended, the plaintiffs introduced sundry witnesses. It appeared that a suit had been instituted by the plaintiffs against Turner to recover the amount of the note; that it was defended by him on the ground that he never made the note; but that he signed the same only as a witness, and his signature was affixed in the wrong place. It further appeared that this defendant, *McGary*, was notified of this suit, and also notified that this defence was set up by Turner; that he failed to furnish the plaintiffs with any evidence to resist the defence, and the plaintiffs thereupon permitted a nonsuit to be entered in that suit. A future recovery on the note is not prevented, if Turner ever was liable thereon. The defendant by paying the

plaintiffs the amount due, can avail himself of all the right or remedy which he ever had against any of the parties thereto.

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As the defendant was the payee of the note, he must have known the situation in which Turner stood, whether as a promisor or a subscribing witness, as well as where the testimony could be procured to prove that Turner was liable thereon. It was most unquestionably his duty to have furnished all the evidence in his power to enable the plaintiffs to maintain the suit which they had commenced against Turner, and to cut down the defence which Turner had set up. He was not at liberty to neglect or omit to procure this evidence, suffer the plaintiffs to fail of a recovery for want of procuring the testimony which could have been had, and wait until he was sued on his warranty, before he apprised the plaintiffs that any such testimony could be found.

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Taking this view of the obligation of the defendant, he immediately became liable to the plaintiffs when they entered the nonsuit in the suit brought by them against Turner. The testimony, therefore, offered, as to the admissions of Turner, was irrelevant and immaterial, and on that account alone should have been rejected. Some members of the Court on this ground alone would be disposed to affirm the judgement of the county court.

But if the defendant, *McGary*, could defend this suit by proving that Turner did sign the note as a surety for the other signers, and not as a witness, (and I am inclined to think he might under this declaration,) still it appears to me, that the evidence offered was on every ground inadmissible. The evidence offered was the admissions made by Turner. Of course, it was intended that the plaintiffs should be affected by the declarations of a person not a party to the suit, who had no interest in common with them, no interest in the event of the suit, who was alive and might be called as a witness. Now I know of no rule of law which would warrant the admission of this evidence. I know of no cases analogous, where testimony of this nature has been admitted. Nor can I see any soundness in the argument, that these admissions should have been received, because they were against the interest of the party making them, or that the declarations of a person, not on oath, should be received as evidence, because that person would be under a strong temptation not to tell the truth if called on as a witness.

It is true, as has been argued, that the declarations of a party have been received to prove his signature to a written instrument. The authorities which have been read by the defendant's counsel

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to establish this point are recognized ; but they fall far short of establishing the point which is here contended for, viz. that the declarations of one not a party are evidence for that purpose.

I apprehend that in no case are the admissions of a person, not a party, evidence, where such person can be called on as a witness, unless he is the person really interested in the suit, or there is an identity of interest in him and the party, or he is the agent. And in the latter case, it is only the declarations of the agent at the time the particular transaction took place about which they are made, which can be received : what he says at another time on his own authority is not admissible.

The only cases where the declarations of persons against their interest have been admitted in a suit between others, is where the person who made them is dead.. So firmly has this rule been adhered to, that *Lord Ellenboro'* in the case of *Harrison vs. Blades and another*, 3 Camp. 457, refused to receive in evidence the tax gatherer's receipts, signed by him, to prove the payment of taxes, where the receipts charged him with the receipt of money, and, of course, was an admission against the interest of the person signing the receipts ; and where also the tax gatherer had been in attendance during the term, but was seized with an apoplectic fit, and it was proved that he was given over by his physician, and was *in extremis*—observing, that the witness would probably be dead before the next sitting, when the receipts might be received.

The case of *Walker vs. Broadstock*, 1 Esp. 458, where the declarations of a person living were admitted, was a case where the declarations or opinion of the person were the facts to be proved ; and could therefore be as well proved by the testimony of other witnesses as by the person making them.

The declarations of the occupier of lands, or of a tenant, are admissible upon this principle in some cases. In others they are admitted where they accompany acts, and are explanatory of them.

It has been contended that the admissions or receipts of the payee or holder of a promissory note, are evidence for the maker in an action by the endorsee against the maker. This however is, at least, questionable, unless the person making the admissions and receipts was identified in interest with the plaintiff in the suit, or unless they are to be received in consequence of the provision of our statute in relation to the negotiability of notes.

I apprehend the current of the English authorities is against receiving the admissions of the payee of a promissory note, even

while he held the note, in an action by the endorsee against the maker, except when the note was endorsed after due. In the case of *Hemings vs. Robinson*, Barnes' notes, 436, which was an action by the endorsee against the maker of a promissory note, the acknowledgement of the endorser, that the name endorsed was in his hand writing, was held not to be sufficient evidence of that fact, upon the ground that no person's confessions but those of the defendant himself could be proved. And it may be here remarked, that this was the acknowledgement of a person against his interest. In the case of *Clipsam vs. O'Brien*, 1 Esp. 10, the letters of the endorser were not received in an action against the maker to impeach the endorsee's title, and this was in a case where the note was endorsed after it became payable. The reporter in a note observes, "that as they were not the admissions of the party, or of the agent, it is difficult to discover a pretext for offering them."

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In the case of *Duckham vs. Wallis*, 5 Esp. 251, it was held, that what was said by the holder and endorser was not evidence in an action by the endorsee against the acceptor; but the endorser should have been called. In the case of *Barrough vs. White*, 4 Barn. and Cres. 325, it was decided by the court of Kings Bench, that the declarations of the payee of a promissory note, when the same was in his possession, that he gave no consideration to the maker, were inadmissible in a suit by the indorsee against the maker; and it was remarked by the judges in that case, that the payee, whose declarations were offered in evidence, was living, and should have been called. In a later case found in 1 Barn. and Ald. 89, *Beauchamp vs. Parry*, it was held, that in an action by the indorsee against the maker of a promissory note, declarations of the payee, while he was the holder of the note, are not evidence to prove that the consideration of the note was money lost at play, unless it be previously shewn that the endorsee is identified in interest with the payee, as by having taken the note after it was due, or without any consideration.

In both of these latter cases it is laid down as a rule, not to be departed from, that where a person is living, and can be called on as a witness, his declarations made at another time are not evidence. The ground upon which the declarations of the payee can be received, where the note was endorsed after due, seems to be this; that where a note is endorsed after due, the person receiving it shall be considered in the same situation as the person from whom he receives it, and be taken to have notice of all the



**CHITTENDEN** other knew concerning it.—7 *Term Rep.* 423, *Boehm and others*  
*January,* vs. *Sterling and others.* *Stakie*, in his treatise upon evidence,  
 1832. states the rule to be, “that the defendant, by proof that the bill was  
*Warner et al.* endorsed to the plaintiff after it became due, places the plaintiff  
 vs. in the situation of the endorser, and may give any evidence to bar  
*McGary.* the plaintiff’s claim which would have defeated that of the en-  
 dorser.”

I apprehend no case can be found to establish the principle that the declarations of the payee of a promissory note are receivable in evidence in an action by the endorsee against the maker, where the note is endorsed before due. The *dictum* of C. J. *Best*, in the case of *Pocock vs. Billings*, 2 *Bing.* 269, would seem to countenance the idea that such declarations were admissible when they were adverse to the interest of the party making them. But this opinion was evidently extrajudicial, was so declared to be by the court of Kings Bench in the case of *Barrough vs. White*, 4 *Barn. and Cres.* before mentioned, and cannot be considered as any authority whatever.

As the statute of this state provides, that in all actions brought by the endorsee of a promissory note, against the maker, the defendant may plead, or give in evidence, any matter or thing which would equitably discharge the defendant in an action by the original payee, I apprehend the declarations of the payee, made while he was the holder, might be received. But the cases where these declarations of a person, not a party to the suit, are received, are not on the ground, that they are against the interest of the party, and therefore admissible; and they do not conflict with the principle, which is certainly well established by all the authorities, that when a person is living, and is an admissible witness, his declarations, not on oath, can on no ground whatever be received in evidence. The county court, therefore, were correct, in rejecting the testimony offered, of the declarations of Turner, who might have been a witness in the cause, even if the defendant had not been notified of the suit brought against Turner, so as to have been precluded from his defence by the proceedings in that case.

The judgement of the county court is affirmed.

## WILLIAM A. PRENTISS vs. MOSES BLISS.

CHITTENDEN,  
January,  
1832.

Money of a debtor in his possession may be taken on execution, if the officer can seize the same without a violation of the personal security of the debtor.

A sheriff who has collected money on an execution is not justified in applying it in satisfaction of another execution against the creditor in the former one.

Neither can money collected by an officer on execution be attached, while in his hands, as the property of the creditor in the execution.

Action on the case against the defendant as sheriff of the county of Chittenden, founded on a receipt executed by his deputy for an execution in favor of the plaintiff against Joseph Sinclear, which the deputy had received to serve, levy and return. The first count was for not paying over the money collected on said execution on demand made. The second count was for not returning the execution. The defendant pleaded, first, the general issue, which was joined to the court; and secondly, in bar, that the execution was paid by Sinclear to the officer holding it in Burlington bank bills, which were received by said officer, and the execution was by him endorsed satisfied; and that immediately after, the bills were attached at the suit of said Sinclear against Thomas M. Taylor and *William A. Prentiss*, the plaintiff in this suit, on a legal writ of attachment, which was duly returned, and was, at the time of the trial, pending in court. To this plea the plaintiff demurred. The county court rendered judgement for the defendant, and the plaintiff appealed to this Court.

*Mr. Porter, for the plaintiff*, contended, that money collected by an officer on execution is not subject to attachment at the suit of plaintiff's creditors.—*Conant vs. Daknell*, 1 D. Chip. 50. That money collected by an officer is not, while in his hands, the property of the creditor.—*Turner vs. Tendall*, 1 Cranch, 117. That an officer, having collected money on an execution, cannot be held as trustee of the creditor, and is not even liable to the creditor until demand.—*Wilder vs. Bailey and Trustee*, 3 Mass. 289.

*Mr. Adams, for the defendant*.—1. Bank bills are subject to attachment and seizure on execution. It seems to have been the policy of our laws to subject every thing to the claims of creditors.—*Stat.* 209. It was once considered that nothing could be subject to attachment, except it could be sold; and that as money could not be sold, it could not be taken. But this notion has given place to common sense; and as the object is to raise money by the seizure and sale, if money can be procured, it may be taken.—*Armistead vs. Philpot*, 1 Doug. 231; *King vs. Webb*, 2 Show.

CHITTENDEN 166 ; *Hands vs. Dobbin*, 12 *Johns.* 220 ; *Holmes vs. Nuncaster*,  
*January*,  
 1832. *same*, 395 ; *Turner vs. Fendall*, 1 *Cranch*, 117.

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 vs.  
 Blise.

2. The bills became the property of the plaintiff from the moment they were paid over to the officer. I am aware that this was considered a point of difficulty in the case of *Turner vs. Fendall* ; but, with great deference, it seems to me, those objections were rather fanciful than otherwise. It is very clear, that when the execution is paid, the bills cease to be the property of the debtor ; and the question is, whose do they then become ? That the officer has power over them, and by improperly mingling them with his own money, or otherwise converting them, may make them his own, is readily admitted. And so may any one who receives bills, money, or other articles, for a special purpose, or on a special deposit, by improper conduct, deprive the owner of his interest. But it does not follow that, therefore, the property is changed. There are numerous cases showing, that where money, bills of exchange, goods, &c., have been received for a particular purpose, they do not become the property of the person who has them in possession ; and, on his becoming bankrupt, will not go to his assignees.—2 *Stark. Ev.* 185, 190, and cases there cited. The officer, in legal contemplation, is the agent of the creditor ; and on the receipt of the money, it becomes the creditor's, and may be followed and claimed by him so long as it can be designated. If, when the money is paid, it is enclosed in the execution, or otherwise labelled, it is as much the creditor's as if it had been paid to him. If the officer should become bankrupt, his assignees could not hold it. If the money was forcibly taken from the officer, the creditor might sue for it : on the death of the officer, it would not pass to his administrator. To show that it becomes the property of the creditor, let us inquire if the officer could attach it ? I trust not. There is no reason why the creditor should say, it is not his. If the officer has done his duty by keeping the money distinct, it is not for the creditor to reject it. The creditor by his refusal cannot change the nature of the property, nor thus evade the claims of his creditors. So far as policy is concerned, it is, we think, good policy to put such a construction upon the law as will best effect the intention of the legislature, and subject every thing of a tangible kind to the claims of creditors.

The opinion of the Court was delivered by,

WILLIAMS, J.—This case comes before us on demurrer to the

defendants plea, a final judgement having been rendered for the defendant in the county court. This question alone is presented : whether a sheriff, having collected money on an execution, is justified in applying that money in satisfaction of another execution against the creditor in the first execution. In this case it is disclosed in the plea, that the money which was collected for the plaintiff was bank bills ; but this cannot affect the question under consideration. Bank bills pass, and are received as money, though there might be a greater inconvenience in subjecting bills to the process of attachment or execution than specie, as they are not always true representatives of the latter at their nominal value.

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January,  
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Bliss.

It has been a vexed question, and has been much agitated in this case, whether money can be taken on attachment or execution. The authorities are conflicting upon the subject. The current of English cases is against the position, that it can be so taken.—*Fieldhouse vs. Croft*, 4 East, 510 ; *Knight vs. Criddle*, 9 East, 48 ; *Willows vs. Ball*, 2 New Rep. 376. On the other hand, the American cases recognize the principle, that it may be taken and levied on, if found in the possession of the defendant.—*Williams vs. Rogers*, 5 Johns. 163 ; *Hands vs. Dobbin*, 12 Johns. 220 ; *Holmes vs. Nuncaster*, 12 Johns. 395 ; *Turner vs. Fendall*, 1 Cranch, 117. If the decision of this question was necessarily involved in the case now to be adjudged, we should decide that money of a debtor in his possession may be taken on execution, if the officer can levy on the same without a violation of the personal security of the debtor.

It does not follow from this, that money in the hands of a sheriff, as in the case under consideration, can be levied on, unless the identical money collected by the sheriff becomes the property of the creditor.

The Court consider that the sheriff, or other officer, who collects money on an execution, becomes thereby indebted to the creditor for the amount collected ; that he does not hold the identical pieces of money, or bills received, as the agent merely of the creditor, without being accountable for their loss, or their depreciation in value, if received in bills ; and that there is no distinction, so far as it regards the right of any other creditor to appropriate the amount in satisfaction of a debt, between an indebtedness arising from this consideration, or any other. The case from *New Reports*, before mentioned, and the case of *Conant vs. Bicknell*, 1 D. Chip. 50, were decided on this ground ; and *Judge Marshall*, in the case of *Turner vs. Fendall*,

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says expressly, "that a right to a sum of money in the hands of the sheriff can no more be seized than a right to a sum of money in the hands of any other person ; and however wise or just it may be to give such a remedy, the law does not appear yet to have given it."

The fallacy of the ground assumed, that the money collected on an execution becomes the money of the creditor, will manifestly appear by enquiring, whether an action of trover could be maintained against the sheriff when he neglects to pay over the money ? Whether, if the money was stolen or lost, it would be the loss of the officer or creditor ? Whether, if received in bills, which at the time, or at any time thereafter, should be subject to a discount, or bear a premium, the creditor would sustain the loss, or have the benefit of the premium ? No one I believe would hesitate to answer all these questions in the negative.

It has been intimated that the court, on an application to them, might direct a sheriff to retain a sum of money levied for the defendant, in another action in which he was plaintiff, to satisfy a demand against him, where there are no other goods nor property, and when the equitable rights of others do not interfere ; and the case of *Armistead vs. Philpot*, Doug. 231, was one of this kind, where such an application was made and not resisted. Yet we are not aware that it has ever been intimated, that, without such application and direction, the sheriff would be authorized or justified in so doing.

Neither do we see any of the absurdities attending this view of the case which have been urged in the argument. It has been said that it is idle to require him to pay over the money to the creditor, when it would be his duty immediately to levy on the same, as soon as it came into the possession of the creditor. But it may be remarked, that there is no greater absurdity in this, than there is in requiring him in all cases to forbear levying on property, until it becomes the property of the person, for whose debt he is about to levy. Whether he or any other person is indebted, and about to make a payment, and whether this payment is to be made in money, or specific articles, he, as sheriff, cannot stop the payment, and seize upon the money or specific articles, until they have become the money or property of the person for whose debt he takes it. Nor do we see any absurdity in an officer making a return of *nulla bona* on an execution or attachment, when he can find no money, goods nor chattels, which are liable to be seized, and taken thereon.

We can find no principle which would justify an officer in thus

making the application of money collected by him on an execution in satisfaction of another execution against the creditor. We cannot recognize his authority to decide between different creditors, nor to set off their several debts, one against the other : but we think his duty is plain, and is not to be embarrassed by any proceedings of this kind. When he collects money on an execution he must pay it over to the plaintiff therein, unless it is stayed in his hands by order of some court of competent jurisdiction.

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The judgement of the county court must be reversed, and judgement rendered for the plaintiff on this plea, that the same is insufficient.

The cause will then be remanded to the county court for the trial of the other issues joined in the case.



OTHNIEL JEWETT vs. DAVID P. AND WILLIAM NASH.

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This Court has not authority, under the act relating to partition of real estate, to assign the interest of one tenant in common to a co-tenant, nor to order the interest of one of several tenants in common to be sold : and a petition praying the Court to make such order, was dismissed with costs.

This was a petition under the act of October 20, 1797, relating to the "partition of real estate in certain cases." The petitioner stated in his petition that he was seized in fee of an undivided fourth part of certain real estate, consisting of a small piece of land and a grist-mill standing thereon, in common with the petitionees ; and that said estate could not be divided without great inconvenience to the parties ; and praying that the Court would order the interest of the petitioner to be assigned to either of the petitionees, who might be willing to pay therefor such sum as the same should be adjudged to be worth by commissioners to be appointed by the Court ; or, in case neither of said petitionees should be willing to take such assignment, and make such payment, that the Court would order that the petitioner's share and interest in the premises be sold.

The opinion of the Court was delivered by,

WILLIAMS, J.—The petition in this case is demurred to. If the petition had simply asked for a partition, leaving it to the Court to make order for a division, or to assign the land to one of the parties, or to make sale of the whole, as from the evidence in the case should appear to be best—the Court might have retained the petition, and rendered such judgement as the case required, al-

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though it would have been as well, and probably better, if the facts would warrant it, for the petitioner to state, that the land could not be divided, without great inconvenience, and pray that the same might be assigned or sold, as the Court should judge just and equitable. This petitioner asks the Court to do that which they are not authorized to do by statute, and does not ask for any thing which they can grant.

The prayer is not that the whole may be assigned to one of the parties, he paying such sum to the other as the commissioners shall judge just and equitable; but that the interest of the petitioner alone might be assigned to one of the other tenants: The further prayer is, not for a sale of the whole premises, as the statute requires, but that the Court would order the petitioner's share and interest in the premises to be sold. This he might sell without the aid or order of the Court.

The petition is not in conformity to the statute, and the judgment of the Court is, that the petition is insufficient, and must be dismissed, and the petitioners recover their cost.

*Doolittle*, for petitioner.

*Bates*, for petitioners.



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### NATH'L GIBSON vs. HORATIO SEYMOUR AND LUKE HALE.

A deed absolute on the face of it, if intended as a security to indemnify the grantee for becoming bail for the grantor, or for an existing debt, is not on that account void, though the design of the parties does not appear upon the deed, nor by any evidence in writing.

This was *ejectment* for 17 acres of land in Salisbury. Plea, *not guilty*.\* The plaintiff claimed title by a deed from Jacob Bartholomew to himself, dated August 7, 1820, conveying a house and lot in Salisbury village, and another tract of 41 acres, which included the 17 acres demanded. The defendants claimed title under the levy of two executions upon the said 41 acres, in favor of the defendant, *Seymour*, against Bartholomew, made June 23, 1823. No objection was made to the validity of those levies.

In order to show the deed to the plaintiff to be fraudulent as against the levy of the executions, the defendants introduced evidence tending to show, that the respective debts on which the executions were founded existed previously to the execution of said deed; and also evidence tending to show, that at the time of executing said deed, Bartholomew was confined in jail at Middle-

\* See the report of a previous trial of this cause in 3 Vt. Rep. 565.



oury, on an execution in favor of one Hall; that no price was agreed on, or talked of, for the land conveyed by said deed, and that no property then passed as a consideration therefor; that Bartholomew at the same time executed to the plaintiff a written assignment of a patent right for making and vending balances. The defendant also gave in evidence two other deeds from Bartholomew to the plaintiff, one dated February 8, 1821, and the other dated October 30, 1821, with evidence tending to show, that in neither instance was any price agreed on, or property passed, as a consideration for the land conveyed; and that after said assignment Bartholomew continued the business of making balances; most of those made, for the first one or two years, going into the hands of the plaintiff.

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In answer to this showing, the plaintiff introduced evidence tending to prove, that the premises contained in the first deed from Bartholomew to himself were incumbered with mortgages to a large amount; that the patent was suspected to be an infringement upon a patent previously granted to one Dearborn, and that the right of Bartholomew was not of much value; that at the time of receiving said deed and assignment, the plaintiff executed with and for said Bartholomew a jail bond on the execution in favor of Hall, and that Bartholomew was then indebted to the plaintiff in about the sum of \$300; that the design of the parties in said conveyance, as well as in the assignment, was to furnish the plaintiff with collateral security for any liabilities which he might incur upon said jail bond, and for any sums which Bartholomew then owed him; (there was not however any written evidence of this purpose in relation to the deed;) that it was understood between the plaintiff and Bartholomew, that the former should further assist the latter to enable him to pay off the mortgages, and to extricate himself from other debts and embarrassments. And the plaintiff produced evidence tending to show, that he continued for some time to assist Bartholomew, by supplying him with stock for the manufacturing of balances, and by paying some debts of his, and received from him balances to a considerable amount, and applied the same either in paying off said mortgages, or to the credit of Bartholomew in account; and that the design of the parties in the two conveyances taken by the plaintiff in February and October, 1821, was to furnish the plaintiff with further collateral security for the debts and liabilities aforesaid, and for further advances and assistance. There was not however any written evidence of this design. It was further in evidence from one

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witness, that the plaintiff prepared the two last conveyances before calling on Bartholomew in relation to the business; and that on one or both occasions, he suggested to Bartholomew the exposure of the land to attachment at the suit of another creditor mentioned; but, at the same time avowing his object to obtain security. The plaintiff also produced evidence tending to show, that in order to redeem the premises, conveyed by the first deed, from the mortgages, the plaintiff had paid to one Reed and to one Hale about \$1500. Most of which however was paid in balances received of Bartholomew, as before mentioned; the last payment being made in 1823. The plaintiff also proved, that Bartholomew having left the liberties of the jail under the supposed protection of our acts of suspension, the jail bond was put in suit, and judgement obtained thereon—That Bartholomew, being committed on the jail bond execution, was in 1828 liberated by taking the poor debtors' oath: and it was admitted that the plaintiff was therefore compelled to pay and did pay the amount of said debt, being over \$200. The plaintiff also produced evidence tending to show, that aside from the extinguishment of said mortgages, and the payment of the jail bond execution, Bartholomew still remained indebted to him upon the dealings and transactions aforesaid to a considerable amount. It was also in evidence, that the plaintiff brought an action of ejectment against Bartholomew for a part or all of the premises described in the deeds before mentioned; and that a writ of possession in favor of the plaintiff was executed in February, 1824. It also appeared in evidence, that after the execution of said first deed, and until about the year 1824, Bartholomew remained in possession of said tract of 41 acres, and had always continued to occupy the house and lot in Salisbury village; and whether he paid rent to the plaintiff, did not appear. It appeared that the defendant, *Seymour*, took possession of the 41 acres in 1825, and had continued in possession ever since—the defendant, *Hale*, being his tenant.

The court charged the jury, in substance, as follows:—That Bartholomew was once the owner of the land sued for, and the general question was, which of these parties had acquired Bartholomew's title? The plaintiff claimed to have acquired it by Bartholomew's deed, dated August 7th, 1820. The defendant, *Seymour*, claimed to have acquired it by the levy of his executions against Bartholomew, on the 23rd of June, 1823; that both of these conveyances were effectual as against Bartholomew; and, as between these parties, whether the deed should prevail

over the levies depended entirely on the question, whether the deed was liable to be impeached for fraud, either in fact or law—

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That to be valid and operative as against the creditors of Bartholomew, it must appear to have been given upon an adequate and valuable consideration, and to have been executed in good faith, for an honest and legal purpose—That considered as an absolute conveyance, it would not be available, but, in construction of law, would be fraudulent, as against the defendant, *Seymour*, a creditor of Bartholomew, for want of any sufficient consideration actually paid for the land. But if it was intended by the parties not as an absolute conveyance, but as a security or mortgage to the plaintiff, for the debt which Bartholomew then owed him, and for the liability which the plaintiff might incur by executing the jail bond, that object constituted a sufficient consideration, and the deed was not rendered void by construction of law, though the design of the parties did not appear upon the deed, nor by any evidence in writing. Yet, that the form of the conveyance, while it turned out that no consideration was in fact paid at the time, was evidence of fraud, which ought to avoid the deed, unless a satisfactory explanation appeared, and the purpose of the parties was shown to have been fair and legal—That in order to ascertain the intentions of the parties at the time, the jury were at liberty to consider all these after transactions which were in evidence, and allow them to influence the question, so far as they tended to show a subsisting and fixed design between the plaintiff and Bartholomew, running back to the execution of this deed, in relation to Bartholomew's property; and if upon all the evidence they should find, that the only object and design of the parties, in the said conveyance of August 7th, 1820, was to furnish the plaintiff with security for Bartholomew's debt, and for signing the jail bond, then their verdict should be for the plaintiff; but if they found that the parties intended to deceive, hinder or defraud other creditors of Bartholomew, by means of the form of conveyance which they adopted, without any defeasance, or evidence in writing to show it a mortgage, then their verdict should be for the defendant.

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The jury returned a verdict for the plaintiff. The defendants filed exceptions to the charge of the court; whereupon the cause was brought up to this Court.

WILLIAMS, J., delivered the opinion of the Court. The jury have found, that the deed under which plaintiff claims was not

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fraudulent. The plaintiff has the older title, and must, therefore, recover, unless from the facts stated the jury should have been instructed that the deed was fraudulent in law. We cannot see any facts in the case which would have warranted the court in giving such instructions to the jury, or which required a charge in any way different from the one given. It appears, that the plaintiff executed a jail bond for Bartholomew, the grantor; and that Bartholomew was indebted to him, and probably the deed was executed upon these considerations alone. But if there was a further consideration, viz. an engagement by the plaintiff to assist Bartholomew in extinguishing the incumbrances, which were then on the land, and also in extricating himself from other debts and embarrassments, the deed would not on that account be void, if there was no fraudulent intent. It is conceded by the defendant's council that an absolute deed, intended merely as security for future advances, is inoperative as against the creditors of the grantor. This court have decided in the case of *Williams and Putnam vs. Parish et al.* in Orange county, March, 1831, that a deed absolute on the face, though intended as a security to indemnify the grantee for becoming bail for the grantor, is not, on that account, void. These principles are decisive of the present case. There was an indebtedness from Bartholomew to the plaintiff, and the plaintiff incurred a liability on signing the jail bond, for which he had an undoubted right to an indemnity. These constituted a good consideration for the deed, and entitled the plaintiff to a verdict. If the plaintiff cannot hold the land, as a security for any further sum due to him from Bartholomew, this can be decided when the defendant asks to redeem the mortgage. Then all the claims, which the plaintiff has, and which are legal incumbrances on the land as against the defendants, can be ascertained.

It may be remarked, however, that an agreement between the plaintiff and Bartholomew, that the plaintiff should pay the incumbrances, which were then on the land, and hold the same as surety therefor, cannot be liable to any objection. Without any such agreement, the plaintiff, if he paid off the incumbrances, to avail himself of the benefit of his deed from Bartholomew, would have had an equitable lien on the land until he was reimbursed in the sums he paid therefor.

The judgement of the county court is affirmed.

*Starr & Judge Phelps*, for plaintiff.

*Seymour*, for defendant.

## JEREMIAH A. WALKER vs. JOSEPH FERRIN.

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Where a party litigant executed a release to a witness to extinguish his interest in the suit, in order to render him competent, and the witness, at the same time, executed and delivered his note to the party in satisfaction of that interest, the validity of which was to depend on the event of the suit,—it was held, that there was a sufficient delivery of the release, though it did not actually come into the possession of the witness, but was immediately destroyed by the party on the witness being rejected.

In such case, if the party be an infant, he is not bound by the discharge ; but

If the party be an adult, he will not be relieved from the effect of the discharge, on the ground that it is tainted with illegality and turpitude, he being a *particeps criminis*.

If a guardian *ad litem* join in the execution of such a discharge, it will still not be binding on the infant : the powers of such a guardian do not enable him to discharge the interest of a witness under such circumstances.

The mere circumstance, that a party executing such a discharge, is an infant, is not in all cases sufficient to avoid it. If it be executed by him on a *bona fide* and sufficient satisfaction of a debt due him, it is binding.

Where one sold a note warranting that the maker had nothing which could be pleaded in offset thereto, and the purchaser sued the note, and was prevented from recovering by an offset pleaded and allowed ;—it was held, in an action brought by the vendee of the note against the vendor, to recover for a fraudulent representation with regard to the offset, that the prior judgement on the note was conclusive evidence of the existence of the claims allowed in offset, the vendor having been present at the trial on the note, and assisted the plaintiff in sustaining the action.

This was a special action on the case, setting forth the sale by the defendant to the plaintiff, of a note executed by one Calvin Bruce to one Silas Bruce, and transferred by said Silas to the defendant, and by him to the plaintiff ; and alleging a fraudulent and deceitful representation on the part of the defendant, that said Calvin, the maker, had no account or claim in offset to defeat a recovery thereon ; and seeking to recover, as special damages, the costs of a suit, instituted by the plaintiff against said Calvin on the note, in which the latter had recovered judgement by means of a setoff. On trial in the county court, it appeared in evidence, that in the trial of the suit instituted on said note by *Walker*, the defendant was offered as a witness on the part of the plaintiff, and he being objected to on account of his interest, *Walker* executed a sealed release to *Ferrin* of all liability whatever arising from the sale of the aforesaid note ;—that Abial Child, Esq. who was appointed by the court in that suit guardian *ad litem* to the plaintiff, *Walker*, joined as such in the execution of said release ; (the plaintiff at that time being a minor ;) that a note was executed by *Ferrin* in consideration of the release ;—that the justice of the peace, before whom the suit was brought, rejected him as a witness, because it appeared the validity of the note was to depend on the event of the suit ; and that afterwards Child, against the

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remonstrances of *Ferrin*, destroyed the release. Calvin Bruce pleaded in offset an account against Silas Bruce, the payee of the note, and recovered thereon. One of the items of this account was a charge of forty dollars for work done on a meeting-house job, undertaken by Silas Bruce. Evidence was given tending to prove, that at the time Silas Bruce procured Calvin to perform the work, he agreed with Calvin to give him up another note which Silas had against Calvin and his brother, Asa, of about thirty dollars, and pay him the balance ; that this had in fact never been done, but Silas Bruce sold that note to another person. It did not appear that Silas Bruce was notified, or knew of the trial of the suit on the note brought by the plaintiff against Calvin Bruce. The court decided, and so instructed the jury, that the release did not operate as a defence to this action ; that *Ferrin*, having been present at the trial of the suit on the note, the account there presented by Calvin Bruce against Silas being allowed by the court, must be considered as *prima facie* correct in this action, until the same was disproved by the defendant in this suit ; and that the charge of forty dollars for work, before mentioned, might well be pleaded in offset to the note sold by *Ferrin* to *Walker*. A verdict having been returned for the plaintiff, the defendant filed exceptions, and brought the cause to this Court, and moved for a new trial.

*Royce and Hodges, in support of the exceptions.*—1st. It is contended on the part of the defendant that the discharge executed to him is a full defence to any suit thereafter. No question can be made as to the manner in which the discharge was executed, (being under seal,) nor as to the delivery, as the case shows it was placed on the table *for him* ; and, even, if a consideration was required, the case also shows he executed his note in consideration of any supposed liability he was under. It then only remains to be determined whether the discharge could be executed by the minor and the guardian *ad litem*. It is believed no well founded objection can be made to such a discharge ; for such a discharge might properly be executed if the whole amount now claimed had been paid in money ; and if such had been the case, would the defendant be compelled to prove by some witness taken with him for that purpose, he had paid the debt thus discharged ? It is also insisted, that the power to discharge a person interested, for the purpose of making him a witness, even without payment, must necessarily reside somewhere to protect the rights of the infant ; and in this

case where would it reside, except in the guardian *ad litem*? It could not be said that a guardian regularly appointed by the probate court could not give a discharge, and not be liable to the infant, if he acted in good faith; and if he could discharge, where is the danger of permitting a guardian *ad litem* to do the same? for he certainly would be liable if he acted fraudulently.

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2nd. It is contended that the court erred in deciding that the judgement in the suit on the note against Calvin Bruce was *prima facie* evidence of the existence of an account which could properly be offset on the note. The case show that Silas Bruce was not present, nor did he know of the trial, nor does it appear from the case that *Ferrin* was notified to attend, unless it may be inferred that he was summoned to attend as a witness for *Walker*. If it is contended that *Ferrin* was entitled to notice, would it be enough to show him present, without showing his connexion with the business of the suit, or that he was asked to prosecute the claim?

3rd. It is insisted that so much of the account of Calvin Bruce, as was agreed to be applied in payment of a note of thirty dollars, should have been applied accordingly, and would constitute a good defence to the note in the hands of the present holder. The note was, in fact, paid whenever the work was done: the case made the application; and unless by a mutual agreement between Silas Bruce and Calvin Bruce, this work was to be applied in some other way: before Calvin had notice of the sale of the note to *Ferrin*, no act of Silas Bruce could direct the application of the work agreed to be applied on the thirty dollar note.

*Bates and Child, contra.*—The only question raised by this case which can admit of any discussion regards the release: as to which the plaintiff contends, 1st. A guardian *ad litem* has no power to discharge the infant's claims; such a power not being incident to his duties and office. 2nd. No guardian can bind an infant by a contract like this, fraudulent in its nature between the parties, and hurtful to the interests of the infant.—7 *Johas. Rep.* 557, *Rogers and wife vs. Cruger et al.*; *American Chan. Dig.* 221, *sect.* 13. 3rd. It does not appear by the case that the contract in regard to the release was fully perfected, nor the reason why the release had not been actually delivered to *Ferrin*.

**PHELPS, J.**, delivered the opinion of the Court.—The first and principle question arising in this case is, whether the release, exe-



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cuted by the plaintiff to the defendant, for the purpose of rendering the defendant a competent witness in the former suit, is a bar to the present action. The objection to its operating as a bar, as made by the plaintiff, is, that it is not to be regarded as having been, in a legal sense, delivered; and further, that if it were so delivered, it is not to be considered a legal or valid instrument.

That delivery is essential to the operation and validity of all written instruments, is not to be questioned; but there are cases, where the contract may be justly regarded as completed and binding on the party, although the written evidence of that contract may not be in his personal possession. The question of delivery depends, in many cases, on the intention of the parties; and an act in itself equivocal may derive its legal effects from that intention, as evidenced by attendant circumstances. In this case, the laying the discharge on the table, in the presence of both parties, and in the power of both, might, and might not, operate as a delivery in a legal sense. Whether it did or did not so operate, depends upon the criterion already suggested. If the note, which appears to have been executed in consideration of the discharge, had been, as we must infer from the case, actually delivered, it would seem, that such an act must be construed as an intentional delivery and a consummation of the contract. The case however, furnishes most satisfactory grounds for this conclusion. The occasion of its production, at the justice's court, was the objection taken to the competency of the defendant as a witness for the plaintiff, in the action then pending. The purpose of its production was to remove that objection; and by whomsoever produced there, it was relied on by the plaintiff as an instrument which had taken effect to extinguish the interest of the witness. This proceeding involves an avowal of its delivery.

The more important question, however, is whether, admitting the delivery, the instrument was effectual to extinguish the claim attempted to be enforced in the present action.

The whole transaction, in relation to the note and discharge, was a gross fraud upon the administration of justice. The agreement in relation to the note, that its validity should depend upon the event of the suit, restored the interest of the witness, and converted the whole proceeding into a corrupt device—a fictitious and simulated contract, entered into for the unlawful purpose of deceiving the court, and imposing upon it, as a disinterested witness, a person in reality as deeply interested as the plaintiff himself. It is not to be supposed, that the law would lend its sanction to a

contract conceived in purposes of fraud, and calculated, moreover, to poison the very fountains of justice. The policy of the law on the subject is well settled. It refuses its aid to such a contract, either for the purpose of enforcing it, or of relief from it. If the contract be executory, it is deemed void ; and if executed, the law affords no aid in extricating the party from the necessary consequences of his criminal act.

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The latter principle might indeed seem to give validity to the discharge in question. But it is to be remembered, that this principle of law applies only in cases where the parties are to be regarded as *participes criminis*. Were the plaintiff, in this instance, of full age at the time of joining in this discharge, it would be difficult to discover upon what principle he could be relieved upon the ground that the discharge is tainted with positive illegality. But he is admitted to have been, at that time, a minor ; and it is worthy of consideration, whether he is so far implicated in the fraud contemplated by that transaction, as to be bound by a contract otherwise voidable.

A minor is not supposed by law to be possessed of legal discretion ; nor to be so far connusant of the legal character and effect of a contract, as to be bound thereby. If he is not considered capable of discerning the natural and necessary import and consequences of a contract, he cannot be supposed capable of judging of those remote incidents, which are derived not so much from considerations of equity and justice between the parties, as from more abstruse and deep laid principles of general policy. And if he is not subjected to the usual consequences of a contract, he ought not to be visited, in regard to them, with the vindictive policy of the law. In short, if he is not bound directly and immediately, he cannot be made so by any circuitry of reasoning, drawn from any accidental or contingent consequences of his contract.

The mere circumstance that a party executing a receipt or discharge is an infant, is not, in all cases, a sufficient reason to avoid it. There can be no doubt, that such an instrument, executed by him upon a *bona fide* and sufficient satisfaction of a debt due him, is binding. For this reason, it becomes necessary, in this case, to inquire into the consideration on which the discharge is founded, and the circumstances under which it was given ; and, as there was no satisfaction nor payment of the claim, but a discharge or release executed, which can be binding only as a positive contract ; and as this contract was entered into under the circumstances mentioned, we are clearly of opinion that he is not

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bound by it ; and that it is not a case where the vindictive rule, above alluded to, can properly be applied.

It is contended, however, by the defendant, that, although this release cannot be considered as binding on the plaintiff, as his own act simply, yet, that, having been executed by the guardian *ad litem*, it is effectual to discharge the claim ; and that the plaintiff's remedy, for any injury he may have sustained, is against his guardian. This depends upon the power of the guardian to bind the plaintiff by the release. Admitting, for argument's sake, that such an instrument may legally be executed by the guardian, as a general rule, yet this rule applies only to *bona fide* and lawful acts. It cannot apply to fraudulent and unlawful acts, nor to contracts, which, for their illegality, would not be enforced, and which, if executed, are binding on the party only upon the principle that he is *particeps criminis*. Indeed, an infant may avoid the act of his guardian, if it be in fraud of his rights, or illegal in its nature.—See *Rogers et ux. vs. Cruger et al.* 7 Johns. Rep. 557. Regarding the release, then, as the act of the guardian, and as illegal in its character, there is no reason why the plaintiff should be bound by it, as the only ground upon which such a contract is ever held binding, to wit, that the party is *particeps criminis*, does not exist in the case.

We are, after all, of opinion, that the guardian *ad litem* had no power to execute the release in question, for the purpose stated in the case. The power of discharging the interest of a witness, in order to render him competent, was never supposed to appertain to the offices of an attorney or other agent for conducting a suit. It is not necessarily involved in an authority to prosecute or defend. The powers of a guardian *ad litem*, appointed by the court, are analogous to those of an agent or attorney appointed by the party. In neither case do they extend to the disposition or control of claims not in issue in the suit ; nor is it easy to discover the source from which the court derive the power of authorizing any interference with claims, which, not being involved in the issue, are of course not within their jurisdiction. There are insuperable objections to the exercise of such a power. The jurisdiction of the probate court is assumed by it, and the general guardian, if there be one, is ousted of his office. The control of the ward's effects is transferred to a tribunal, where the law has not placed it, and the administration of those effects committed to the agents of that tribunal, without the security provided by law. To permit the guardian *ad litem* to exercise a controul over any

thing, except the suit itself, would be dangerous in the extreme.

The power of such guardians has ever been strictly construed. Hence their admissions are not binding on their wards.—See *Cowling vs. Ely*, 2 Starkie's Rep. 366. Nor is the answer of a guardian to a bill in chancery binding on the ward.—See *Beasley vs. Magrath*, 2 Sch. and Lefroy, 34 ; *Wrottesly vs. Bendish*, 3 P. Wms. 237 ; *Leigh vs. Wood*, 2 Vent. 72 ; 2 Mad. Ch. 262. Here the authority of a guardian *ad litem* to discharge the interest of a witness, in order to render him competent, (the precise authority here claimed,) has also been denied.—See *Frazer vs. Marsh*, 2 Starkie's Rep. 41 ; 2 Saund. Pl. and Ev. 948.

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The release in question was therefore no bar to the present action, and the decision of the county court on that point is affirmed.

A further exception, however, is taken to the decision of the court below, viz. ; that they held the judgement in the suit, instituted against Calvin Bruce by the plaintiff on the note in question, to be *prima facie* evidence for the plaintiff in this case.

There are two points of view, in which judicial proceedings may be regarded, when offered as evidence in a subsequent case. A judgement may be relied on as a matter of estoppel, i. e. as a previous determination of the same controversy ; in which case it is, if evidence at all, conclusive evidence between the parties ; and it may be offered as matter *in pais*, as a fact, or a part of a transaction, in relation to which a controversy has arisen ; and in such case, it is relied on, not as a conclusive determination of the identical controversy, but as a fact or occurrence, having a bearing upon the controversy to be settled. When offered in this point of view, its admissibility depends, not so much upon the question who are parties to it, as upon the question, whether the existence of such a judgement is a fact material to the issue.

In the present case, the representation set forth in the declaration relates to the collectability of the note, and was substantially, that there was no claim in offset to defeat a recovery on it. This being the case, a recovery in the suit on the note, would have satisfied the representation, and been decisive of the present controversy. On the other hand, the judgement for the defendant in the former suit goes to establish the fact, that the plaintiff failed to collect the note, which is essential to his recovery here. The record further shows that failure to have been occasioned by means of an account pleaded in offset by Bruce, another fact equally essential to the right of recovery. Thus far the proceed-

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ings in relation to the note are to be regarded as mere matters *in pais*, material to the issue, and to be proved, as is admitted on all hands, by the only proper evidence, the record of those proceedings. The admissibility of this evidence is not contested by the defendant ; but it is insisted, that, although this evidence establishes the fact that such a judgement was rendered, yet it is not even *prima facie* evidence of the correctness of that judgement, or of the existence of any state of facts which would warrant it. If it is conceded that the record was properly in evidence, and the fact of a failure to recover on the note, established by it, then the question raised in this case becomes simply a question, whether, in the absence of all proof in relation to the merits of the case then decided, the presumption is in favor of the judgement or against it? Or, in other words, whether there is any case, where the law makes a record evidence, but, at the same time, presumes it to be false.

The presumption of law is in favor, not only of the regularity, but also of the justice of all judicial proceedings ; and if a contrary presumption were to prevail, the result would be, that every adjudication in favor of a claim, however often it might be repeated, would only furnish additional evidence that it was unfounded and false.

It is to be observed, however, that the charge of the court, in relation to the effect of this judgement, had reference to the fact, which appears in the case, that the defendant was not only notified of the former suit, but was present at the trial, and aiding in sustaining the action. If, on that occasion, he could not satisfy the court of the plaintiff's right of recovery, and if he offered in *this* case no evidence to show that he *should* have recovered, were not the jury warranted in finding, that the set off in that action was properly allowed? And were not the court justified in charging, that the judgement in the first action was *prima facie* correct? The defendant had his day in court to contest the set off, and, according to the decision in the case of *Warner & Co. vs. McGary*, decided by this Court, the present circuit, in Chittenden county,\* the judgement might be held conclusive evidence against him, as to the merits of that suit.

As to the other point raised in the case, upon the ground that the account pleaded in offset was originally agreed to be applied to another note, between the same parties, it is sufficient to ob-

\* See ante p. 507.

serve, that, by the sale of this last mentioned note, the party had disabled himself from performing that agreement, and had virtually rescinded it.

Judgement affirmed.

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V and H executed a joint and several note to G. Judgement having been obtained on the note against V, he was committed to jail on the execution, gave a jail bond, and was admitted to the prison liberties. G afterwards received from V, a part of the debt, and in consideration thereof, discharged the bond. It was held in an action brought against H, the other maker of the note, that the discharge of the bond was a full and complete discharge of the whole debt, and consequently of H, the other signer.

This was an action on promissory note executed by the defendant jointly and severally with one Virgil Long, and made payable to James Green, or order, and by said Green endorsed to the plaintiff. Plea, *general issue*. It appeared that Green, previous to his endorsing the note to the plaintiff, obtained a judgement thereon against Virgil Long, and caused him to be committed to jail on the execution;—that while Long was thus imprisoned on said execution, he entered into negotiation with S. H. Merrill, the agent and attorney of Green, to procure his discharge from imprisonment;—that he paid Merrill fifteen dollars, (being considerably less than the debt,) for that purpose;—that thereupon Merrill endorsed on the bond, these words; “I hereby discharge this bond.—S. H. Merrill, plaintiff’s attorney;” and that Virgil Long immediately departed from the limits of the jail. The court having decided, that this operated as a discharge of Horace Long, the present defendant, ordered a non-suit, with leave to move to set it aside, should this Court, on a hearing, reverse that decision. The plaintiff, therefore, brought the cause to this Court, and moved that the non-suit be set aside.

*Merrill and Ormsbee, for plaintiffs.*—The discharge of Virgil Long from imprisonment on an execution against him alone, issued on a judgement against him on a joint and several note, signed by him and the defendant, does not release the defendant, from his original undertaking in the note.—1 *Pet.* 573, and the authorities there cited; 2 *Ver. Rep.* 212, *Spencer vs. Williams and others*. If Virgil Long had been discharged on taking the poor debtor’s oath, it would have been no discharge of the debt, either as against him, for the purpose of procuring a judgement,

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nor as against the defendant.—*Stat.* 222, 241. The defendant not being a party to the suit in which the original judgement was rendered, nor a party to the bond, cannot be released by the discharge of the bond. The presumption of satisfaction which the law raises on the release of the person, is entirely removed by the case, which states that considerably less than the original debt was paid.

*Royce and Hodges, for the defendant.*—The release of Virgil Long from imprisonment by the plaintiffs in the execution operates as a discharge of the note in suit as to all the parties, and not merely as a covenant not to sue him.—*Vigers vs. Aldrich*, 4 Burr. 2482; *Jacques vs. Withey*, 1 T. R. 557; *Clark vs. Clement and English*, 6 T. R. 525; *Taylor vs. Waters*, 2 Chit. R. 303; *Enos vs. Fenno*, Bray. 36; *United States vs. Stansbury et al.* 1 Pet. Rep. 573.

The opinion of the Court was delivered by,

WILLIAMS, J.—The note on which this suit was instituted appears to have been executed by the defendant jointly and severally with one Virgil Long, who has been heretofore sued on the same. Judgement was recovered against him in the suit, and an execution issuing thereon, he was committed to jail, and admitted to the liberties of the jail yard. While he was in jail he entered into a negotiation for a discharge, and, on payment of about fifteen dollars, the jail bond taken on his admission to the liberties, was discharged by Mr. Merrill, the agent and attorney of one Green, who was the original payee of the note, and who then held the same. Green after this endorsed the note to the plaintiffs.

The effect of this, if not a direct discharge of the debt, was a discharge of the jail bond, and a discharge of Virgil Long from his imprisonment on the execution.

The question is, what is the operation of this proceeding, as it respects either Virgil Long, or the defendant, or both. As to Virgil Long it was a consent on the part of the creditor to his escape from jail, and an escape by him, with such previous consent.

No rule is better established at common law than this; that an escape of a debtor, who is in prison on execution, with the consent of the creditor, is a discharge of the debt; and no other execution can issue against him, nor can any action of debt on the judgement be maintained against him. This rule is laid down in the case of *Scott vs. Peacock*, 1 Salk. 271; *Vigers vs. Aldrich*, 4 Burr. 2482; *Jacques vs. Withey*, 1 T. R. 557; *Clark vs. Clem-*



*ment and English*, 6 Term, 525. It was so decided in this state in the case of *Enos vs. Fenno*, Bra. 36 ; in the state of New-York in the case of *Yates vs. Van Rensselaer and Schermerhorn*, 5 John. 364 ; by the Supreme Court of the United States, in the case of the *United States vs. Stansbury et al.* 1 Peters. 573 ; and cannot now be denied, or questioned, unless altered by the legislature.

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This rule is founded upon a presumption, that if a creditor has caused the body of his debtor to be taken in execution, and consents to his release, he receives an equivalent for such release, in satisfaction of his debt. The law attaches to this act, as a legal consequence, a presumption, that the debt is satisfied, which cannot be rebutted by any proof of the actual intention, either of the debtor or creditor.

This legal presumption is not, as was urged by the plaintiffs' counsel, upon the ground, that a commitment is of itself a satisfaction of the debt ; for we find that a subsequent assent by the creditor does not operate as a discharge of the debt. Nor does an escape against the consent of the creditor so operate ; as where the sheriff suffers a voluntary escape ; in which case he cannot retake the prisoner, although the creditor may. Nor does a discharge of the debtor under the insolvent debtor's act in England, nor a discharge on taking the oath provided by the statute of this state for poor debtors, or a discharge like the one mentioned in the case of the *United States vs. Stansbury et al.* where the common law was altered by statute. These cases all shew that it is not the commitment, which is considered as a satisfaction of the debt ; but the escape with the previous consent of the creditor.

The result is, that the discharge of Virgil Long, as stated in the case, was, as to him, a discharge of the debt ; and neither his body nor property were further liable thereon. As a necessary consequence of this, the debt, as to *Horace Long*, the other signer of the note, was also discharged, whether it was so intended or not.

A discharge of one of two joint obligors is a discharge of both. If a plaintiff consents to the discharge of one of several defendants taken on a joint *ca. sa.*, he cannot afterwards retake him, or take *either of the others* on an alias. This was the point determined in the case of *Clark vs. Clement and English*, before referred to, and is an authority directly in point on the question now under consideration.

The only question which can remain in this case is, whether

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Mr. Merrill had any authority thus to discharge the debt as against Virgil Long.

It may be very doubtful whether an attorney, employed only to collect a demand committed to him, would be vested with any such authority. It has been decided, both in New-York and Massachusetts, that the attorney for the plaintiff in the suit has no authority from his general character as an attorney to discharge a defendant from execution on a *ca. sa.* until the money is paid; and this is undoubtedly the common law upon this subject.—*Jackson vs. Bartlett*, 8 *Johns.* 280; *Lewis vs. Gamage*, 18 *Mass.* 347. Sometimes a discretionary power is given to attorneys in this state, and their authority may be directly proved, or it may frequently be inferred from the circumstances attending each particular case. We cannot decide this case, however, by determining what is the general authority which an attorney, as such, may be supposed to possess over the demands committed to him to collect.

This question was not thought of at the jury trial, and is not made a point in the case. The trial was had on the supposition that the attorney was authorized to do what he did, whatever might be the consequences. The case states that Mr. Merrill was the agent and attorney of Green, the holder of the note. Nothing further is presented by which we can determine the extent of his agency, whether he was merely the attorney in the suit, or the agent and attorney of the creditor authorized to make a negotiation with the debtor.

If the plaintiff relied on the want of authority in Mr. Merrill, he should so have presented the facts that the county court, and this court, could determine from them, the nature and extent of the authority given to him. If Mr. Merrill was authorized to make the negotiation with Virgil Long, which was made either by an express, or by an implied authority, the creditor must abide by the consequences resulting from what he did.

We can see nothing to warrant us in inferring a want of such authority, and the acts of the agent and attorney must be considered as the acts of the principal.

The consequence is that the judgement  
of the county court must be affirmed.

## ROBERT TEMPLE vs. ABNER MEAD.

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Under the constitution of this state, *printed votes* may be legally received for Governor, Lieutenant Governor, Treasurer and Councillors, who are to be chosen annually by the freemen.

This was an action on the ~~case~~ brought by the plaintiff against the defendant for refusing to receive a printed vote, on which there was a judgement for the plaintiff by consent in the county court; and it was agreed that the case should pass to the Supreme Court, for final judgement on the following case stated:—

“ The plaintiff, a freeman and legal voter in the town of Rutland, and state of Vermont, at a Freeman’s meeting duly warned and holden at Rutland, on the first Tuesday of September, A. D. 1830, for the purpose of electing a Governor, Lieutenant Governor, Treasurer of the state, and Councillors, for the year ensuing, offered to the defendant, (within the time required by law,) the presiding officer in said meeting, his vote for Governor, Lt. Governor, Treasurer of the state, and Councillors, on a piece of paper, on which were legibly *printed* the names of the following persons, Samuel C. Crafts, for Governor, Mark Richards, for Lt. Governor, Benjamin Swan, for Treasurer; for Counsellors, Myron Clark, Samuel Clark, Robert Pierpont, Thomas D. Hammond, William G. Hunter, Ezra Hoyt, Jedediah H. Harris, John C. Thompson, George Worthington, Benjamin F. Demming, James Davis and Ira H. Allen; and the defendant refused to receive, and did reject, said vote, assigning for a reason, that the names of the candidates were printed; and refused to receive the same for that, and for no other reason. If the defendant erred in not receiving said vote, for the cause assigned, then the judgement of the county court is to be affirmed; otherwise, to be reversed.

*Royce and Hodges, for defendant.*—The propriety and expediency of permitting printed votes to be substituted for written ones, forms no part of the present discussion; for if it is established that the framers of the constitution used the word understandingly, the danger, and even criminality, of defeating their intentions by a judicial decision, must be too apparent to need its being urged before this tribunal. To suppose that the framers of our constitution used the word “written,” without fully comprehending its meaning, is casting an imputation upon their knowledge of language which illy coincides with the wisdom displayed in framing it. If at the time the present constitution was adopted, printing presses had not been established in this, and surrounding

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states, there might be some foundation for supposing that the word was not used in its most common acceptation ; but the fact that it was so, is conclusive evidence that they either feared the influence which might be exerted by the press, or that they considered the expression of the public mind more clearly indicated by having every freeman who went to the polls, put in the vote in his own hand writing. It is not denied that when a word is used known to the common law, that a reference must be had to its meaning as ascertained by judicial decisions ; but this rule does not apply to words in common use, and where the meaning is obvious to every one. The practice, under the present constitution, of every freeman in the state, is most conclusive to prove, that the language of the constitution has been literally understood, and no one has pretended to doubt its meaning, although its expediency has been, and still may be, doubted.

*Mr. Ormsbee for the plaintiff.*—By the constitution the freemen of this state are required to bring in their votes for Governor, with his name fairly written.—*Comp. Stat. p. 46, sec. 10.* It seems also to be contemplated that the Lieut. Governor, Treasurer, and Councillors, shall be voted for in the same manner. The question intended to be raised in the present case is, whether a vote, on which the names of the persons voted for are fairly and legibly printed, comes within the provisions of the constitution. It is a general rule of construction, as applied to statutes, (and no reason is seen why it should not apply in the present case,) that the intention of the makers of a statute is to be pursued in its construction; and this is best inferred from the cause, necessity, and object of such statute. To ascertain the persons voted for by such freeman, by having the name of each person voted for fairly and legibly written upon the vote, it is believed was the intention of the framers of the constitution in inserting this provision. Public policy and individual convenience both would seem to require that this designation of the individual voted for, might be made in any manner which would, with the greatest facility, and with sufficient certainty, express the intention of the voter, while it should not be unduly burdensome to the several officers whose duty it is made to receive the votes and transmit them to the place where they are counted. The constitution merely requires that the name of the person voted for should be fairly written. Had the persons, who inserted this provision in the constitution, wished to effect any thing more by it than merely to require that the voter

should designate the person he voted for by his name fairly written, (that is, fairly expressed in letters) they would unquestionably have prescribed the manner in which the name should be written, the material upon which it should be written, and the instrument with which the characters should be traced. Upon all these points the constitution is silent, and leaves them to be fixed by custom, by judicial and legislative construction, and by the application of sound common sense. A freeman might, within the strict letter of the constitution, offer his vote written upon a table of lead, or a mass of marble, or upon any other material equally cumbersome and inconvenient; but no one would for a moment maintain that the proper officer would be bound either to receive, or transmit, such a vote. Neither could there have been the slightest doubt upon this subject in such an extreme case, even if the legislature had not made provision that the names of the persons voted for should be written upon *paper*, though there might have been as to many other substances.—See *Comp. Stat. p. 572*. It is matter of public policy, that every safe facility should be given for furnishing the freemen of the state with votes; and, aside from the convenience of printed votes, they are a great safeguard against imposing upon ignorant and careless voters, by means of names purposely written with the pen, so as to be nearly illegible, and entirely so to those not accustomed to decypher blind, blurred, or blotted penmanship.

2nd. When a statute makes use of a word the meaning of which is known to the common law, the word shall be understood in the same sense.—6 *Mod.* 143. No reason is seen why this rule should not apply in the present case. By the common law a deed consists of three parts, writing, sealing, and delivery. A deed is defined to be a *writing*, sealed and delivered by the parties.—3 *Jac. L. Dict.* 215; 1 *Inst.* 171. This definition is adopted by *Blackstone*, 2 *Com.* 295. It is believed to have been the uniform course of courts, both in England and this country, to consider printing, in deeds and in other contracts, as equivalent to writing; in other words, to consider printing as being included in, and merely a variety of, writing. A deed must be written, or, (as is the case at present with many instruments, such as bonds, policies of insurance, &c.,) *printed*.—*Co. Lit.* 229. A deed may be written in any hand, as in text, court, or Roman hand.—2 *Co.* 3; 2 *Bl. Com.* 297. Among the requisites of a good deed, writing is enumerated.—2 *Bl. Com.* 308. By statute it is required that all leases, estates, interests of freehold or term of years, crea-

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ted by livery and seizin only, or by parol, and not in writing, shall have the force and effect of estates at will only. All assignments and contracts for the sale of land are also required to be in writing. That in all these cases printing should have been considered as equivalent to, or rather included in, writing, seems to have fixed the meaning of the word beyond reasonable question, both by legislative use, and judicial construction.

3dly. It is contended that the use of the word "*written*," in the English language, as meaning simply, that what is written is "*expressed in letters*," without regard to the manner in, or the instrument with, which those letters are formed, is a use of the word well warranted both by the common practice and acceptance of mankind, by the example of the learned and skillful in language, and by the uniform current of definitions in the most approved lexicographers. By turning to the definitions in *Webster* and *Johnson*, of the word *written*, from the verb *to write*, and of the substantive, *writing*, and comparing them with the definitions of *printing* and *printed*, it will be found, that *printed* is the being indented or impressed with letters or characters; that *printing* is impressing letters or characters or figures, on paper, cloth, or other material; that *to write*, is to express by forming letters and words on paper or stone, as to write a deed; that *to write*, is also the act of forming characters, letters and figures, as the representatives of ideas; that writing is the act or art of forming letters and characters on paper, wood, stone, or other material, for the purpose of recording the ideas which words and characters express, or of communicating them to others by visible signs. It is contended, therefore, by the plaintiff in this case, that what the framers of the constitution intended by being fairly written, was the being fairly and legibly expressed in letters. To suppose otherwise would be to suppose that they intended to use the word in its restricted, instead of its general, acceptance, in a sense contrary to its well known legal signification; and finally, to give it a meaning which would be injurious and inconvenient, when, with more propriety, they might give it a meaning which would be convenient for the individual and beneficial to the public.

The opinion of the Court was delivered by

WILLIAMS, J.—At the freemen's meeting which was held in Rutland, in September, A. D. 1830, the plaintiff offered to the defendant, who was first constable of the town, and presiding officer of said meeting, his vote, on which were legibly printed the

names of the persons he intended to vote for, as Governor, Lieut. Governor, Treasurer and Councillors, designating the offices intended for the several persons named. The defendant refused to receive said vote because the names of the candidates were printed. The plaintiff complains of this as an injury, for which the defendant is liable to make reparation, and brings this suit to ascertain whether the defendant was justified in refusing to receive his vote on that account. The case requires us to decide whether, under our constitution, printed votes can be received for the several officers who are to be chosen by the freemen at the annual election.

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The words of the constitution are, "The freemen of each town shall, on the day of the election for choosing representatives to attend the General Assembly, bring in their votes for Governor, with his name fairly written," &c. It then provides that the votes shall be sealed up and transmitted to the General Assembly, to be there counted. The same provision is made in relation to the votes for Lieut. Governor, Treasurer and Councillors, except that it is not required that the votes for Councillors shall be returned. The statute passed in 1815 requires that the votes of each freeman for the several officers aforesaid, shall be on one ticket or piece of paper, and that the presiding officer, together with the select-men, justices of the peace and town clerk, in the presence of the meeting, shall cut apart the votes given for Governor, Lieut. Governor, Treasurer, and Councillors, and enclose, certify, and seal them up separately, and transmit them as required by the constitution. If we were at liberty to consult the convenience of the voters alone, there is no doubt it would be greatly promoted by permitting the use of printed votes. From the terms, "*fairly written*," it has been supposed by some, that no other vote could be received, except those where the name of the person voted for was written with pen and ink. And if our decision is to be governed by the practice which probably prevailed at the time the constitution was adopted, and we are to suppose that the framers of that instrument meant to adopt that term as it was then understood in its ordinary acceptance, and intended to exclude every other species of writing, then indeed we must come to the conclusion that all votes must have the name of the person voted for written with pen and ink, and exclude every other species of writing, even that which is now so commonly used, writing with a pencil.

But I apprehend, in giving a construction to a constitution



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which was to secure the rights and liberties of the citizens, and which was intended to present a frame of government and a mode of election for future generations, as well as for the one then on the stage, we are to regard its spirit, and endeavour to give effect to its provisions, without regarding too strictly the literal meaning of the terms made use of.

In deciding upon written contracts, we are frequently under the necessity of interpreting the language used, by recourse to certain technical rules of construction, wholly different from what the parties intended. But if, in interpreting the language of a constitution, a strict adherence to technical rules, or adopting terms made use of in their literal or strictly legal sense, would occasion a manifest departure from its spirit and intent, we may then resort to other rules of interpretation, in order to carry its provisions into effect.

In construing the clause of the constitution now under consideration, we ought not so to consider it as to lay the freemen under any unnecessary restraint or embarrassment in the expression of their opinion as to the most suitable person to fill the several public offices for which they may vote. We ought not to believe that it was intended that voting for those officers should always continue in the same particular manner, or that the votes should be of the same materials, or in the same way which was then in use, without any regard to the changes which might take place, or the improvements which might be made. This limited view of the constitution would wholly destroy the statute passed in 1815, under which all our elections are now made. On the other hand, we must not open a door which would lead to anarchy, nor should we give facilities to any measures which would tend to bribery and corruption, or essentially impair the purity of the elective franchise, and which the makers of the constitution would have guarded against, had it been foreseen.

Keeping in view these principles we may inquire what was intended by the article of the constitution under which this question has arisen ; whether it was meant to exclude printed votes, or whether we can infer from any other part that they would have been excluded if the term made use of did not sufficiently express this meaning. I apprehend that all which was intended in this article, was to secure to the freemen the privilege of voting for the several state officers therein named by ballot, as that term is usually and generally understood in this country ; and that while this privilege is secured, the form of the vote or ballot, or the man-

ner in which the name of the person intended for the office is impressed thereon, is wholly immaterial, if it is fairly and intelligibly expressed, and the manner does not expose the person voting to any improper influence, or those who are to receive and count the vote, to any unnecessary inconvenience or trouble. In different parts of the constitution, and also in the various laws which have been passed to carry the same into effect, as well as in the practice thereon, it will be found that the terms vote, suffrage, and ballot, have been used as expressing the same meaning. Thus in the 8th section of the constitution, the members of the House of Representatives are to be chosen by *ballot*. In the election of the Governor, &c., the people are to "bring in their votes," and if there is no election by the people, the "Council and General Assembly, by their joint *ballot*, are to elect," &c. The oath prescribed to the freemen, 21st section, is, "whenever you give your *vote or suffrage*." Sometimes the term vote is made use of to signify the opinion of the individual, as expressed by ballot; sometimes as expressed viva voce, and sometimes for the collective opinion of a body of men. Thus in section 14th, "The votes of the General Assembly shall be printed," &c., "with the yeas and nays, except when the *vote* shall be taken by ballot, and every member shall have a right to insert the reasons of his *vote* upon the minutes," &c. The members of the General Assembly are sworn that "they will not assent to any bill, *vote* or resolution," &c. These are examples of the use of the terms in all their different significations. In relation to them it will be seen that we cannot give any technical definition of, or meaning to, any particular word used in the constitution, and adhere to the same meaning wherever the same word occurs.

In this country, and indeed in every country where offices are elective, different modes have been adopted for the electors to signify their choice. The most common modes have been, either by voting viva voce, that is, by the elector openly naming the person he designates for the office, or by ballot, which is depositing in a box provided for that purpose, a paper on which is the name of the person he intends for the office. The principal object of this last mode, is to enable the elector to express his opinion secretly, without being subject to be overawed, or to any ill will or persecution on account of his vote for either of the candidates who may be before the public. The method of voting by tablets, in Rome, was an example of this manner of voting. There certain officers appointed for that purpose, called Diribitores, de-

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livered to every voter as many tablets as there were candidates, one of whose names was written upon every tablet. The voter put into a chest prepared for that purpose which of these tablets he pleased, and they were afterwards taken out and counted. Cicero defines tablets to be little *billets*, in which the people brought their suffrages.

The clause in the constitution directing the election of the several state officers, was undoubtedly intended to provide that the election should be made by this mode of voting, to the exclusion of any other. In this mode the freemen can individually express their choice in an easy and convenient manner, without being under the necessity of publicly declaring the object of their choice; their collective voice can be easily ascertained, and the evidence of it transmitted to the place where their votes are to be counted, and the result declared with as little inconvenience as possible.

If this can be effected as readily by the use of printed votes as by any other, and if no rights or privileges of either the freemen, or those who may be candidates for their suffrages, will be thereby infringed, most assuredly those votes ought to be received, if any freeman elects that method of expressing his opinion. And no one can confine a freeman to any particular way of voting by ballot, unless that way is unequivocally declared to be the only one by the law or by the constitution.

The adoption of printed votes is certainly an easy and convenient mode for the people to express their choice, and in one respect is preferable to any other. It will be less liable to mistakes arising from bad writing, misspelling, the omission of initial letters, or additions, to distinguish persons of the same name. It presents no greater facilities to ascertain what ballot the freeman puts into the box, for he may vote as secretly by a printed ballot as by any other. The aggregate can be as readily ascertained, and the votes transmitted to the General Assembly to be counted with no greater inconvenience. We are therefore disposed to say that votes on which the names of the persons voted for are printed, may as well be received as if they were written, according to the spirit and intent of the constitution.

Nor do we find any thing in the letter of that instrument which requires us to say that the votes should be written as the defendant contends. The definition of the word writing includes printing; it means no more than conveying our ideas to others by letters or characters visible to the eye. It is so used by all writers

and generally comprehends printing, engraving, &c. in opposition to the mode of conveying them viva voce.

ADDISON,  
January,  
1832.

In all legal writers, and in the statutes which have been enacted in this state and elsewhere, the expression is made use of in the same general and comprehensive sense.

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Several instances of this were mentioned in the argument. A deed is defined to be a writing, signed, &c. ; yet it is always said that it may be printed. The statute says, "no action shall be maintained on any agreement for the sale of lands," &c., unless the agreement, &c., be in writing, and signed by the parties. Other contracts, to be legally binding, are required to be in writing.

It would not be contended that, by these statutes, an agreement wholly in print, signed by the parties, would be ineffecutal. Writs are defined to be precepts in writing, yet it is notorious that they are printed. In some states, not only the writs, but the names of the clerks or prothonotaries, from whose office they issue, are printed. The instances are numerous in which printing is considered essentially the same as writing.

This same question has lately been agitated in the state of Massachusetts, in a case between Henshaw, plaintiff, and Foster and others, defendants, under a constitution where the expression is similar to ours. Chief Justice Parker, in a very able and elaborate opinion, shows most clearly that the use of printed votes is not contrary to the letter or spirit of the constitution, but is in strict conformity to both : and he was sustained by the decision of the other members of the Court.

It has been said that the decision of the Supreme Court of the state of Maine is to the same effect.

This case was argued at the last term of this Court. The Court had it under consideration. Judge THOMPSON, who took the papers, and whose sickness and death prevented his giving the opinion of the Court, concurred in the result to which we have arrived at this time ; and I am authorised by the Chief Justice who heard the argument at the last term, but who is not present at this time, to say, that his opinion was with the plaintiff on this point, that a vote on which the name of the person voted for, is printed, is in conformity with the constitution.

The opinion of the Court on this part of the case is, that the plaintiff had a right to vote for the persons for the several offices of Governor, Lieut. Governor, Treasurer and Councillors, by a vote on which the names of the persons voted for, for those offices respectively, was printed, designating the offices intended for

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the persons voted for ; that his vote which was offered ought to have been received and put into the ballot-box ; and that the defendant, as presiding officer of the freemen's meeting, erred in not receiving the vote which was offered, on account of the names being printed thereon.

This, by the agreement of the parties, entitles the plaintiff to a judgement, or to an affirmance of the judgement of the county court.

Lest, however, from the decision, it should be thought that we consider the presiding officer liable in all cases for refusing to receive a legal vote, agreeably to the decision in some one or more of our sister states, we deem it proper to say, that the declaration charges the defendant with having *maliciously* rejected, or refused to receive the vote of the plaintiff. It is not certain that the facts agreed on present a case of malice on the part of the defendant, but on the contrary it appears to be only an error in judgement on a point which was considered doubtful. Whether in the latter case the defendant would be liable, has not been made a question in the argument,—nor have we been called on to decide in what cases a constable or other officer presiding at a freemen's meeting, would render himself liable by refusing to receive a legal vote. We are unwilling to have it considered that this question is decided in this case, especially as it has not been urged in argument by either party.

If there has been any mistake or oversight in drawing up the case, or if all the facts are not disclosed which tend to show the motives of the defendant, we should be disposed to listen to an application on his behalf for another trial, in which the jury can determine in relation to his motives. Otherwise, the judgement must be according to the agreement of the parties, that the judgement of the county court be affirmed with costs.

*Ormsbee*, for plaintiff.

*Royce & Hodges*, for defendant,

## WILLARD BATES vs. LYDIA STEVENS.

BENNINGTON,  
February,  
1832.

If a *feme sole* plaintiff marry pending a suit, and no proceeding is had under the statute with regard to the marriage, and the defendant does not plead the coverture in abatement, but suffers a default in the action, he cannot afterwards avoid the judgement by writ of error.

This was a *writ of error*, brought to reverse a judgement rendered by the county court in favor of the present defendant, *Stevens*, against the present plaintiff, *Bates*. It appeared by the record that the suit in which the judgement complained of was rendered was an action of ejectment on mortgage, commenced on the 16th day of April, 1829, and was entered at April term. The defendant, *Bates*, appeared by attorney the same term, and pleaded the general issue, which was joined. The cause was continued from term to term, till April term, 1830, when a judgement was rendered for the plaintiff, *Stevens*, to have and recover the seizin and possession of the premises demanded. *Bates* was allowed a review in the cause, and at the September term, 1830, judgement was rendered against him on default. *Bates* then moved the court for leave to redeem the premises by paying the sum due on the mortgage. The cause was thereupon further continued till April term, 1831, when time was given for him to redeem by paying the sum of three hundred and fifty-three dollars and seventy-three cents, being the sum due on the mortgage and cost of suit. The error complained of was, that after the commencement of said action, and before the rendition of the judgement, to wit, on the 10th day of September, 1829, at West Bloomfield, in the state of New-York, where the said *Lydia Stevens* resided, she was duly married to one Edmund French, who at the time of rendering the judgement was still living, and was the husband of the said *Lydia*, and that said French was not joined with said *Lydia* in the action.

*U. M. & D. Robinson, jr. for plaintiff in error.*—By the marriage of a *feme sole*, her legal existence is merged in that of the husband.—1 *Swift's Dig.* 18. Coverture of *feme* plaintiff or defendant is ground of error.—2 *Tidd's Practice* 1107 ; 2 *Saun.* 101. If a *feme covert* plead to issue as *feme sole*, and judgement be rendered against her, and she is taken in execution, she and her husband may join in a writ of error.—2 *Tidd*, 1052-53 ; *Swift's Dig.* 791. So if an action be brought against a *feme covert* and others—all may join in error, although defendants waive their plea in abatement.—2 *Tidd*, 1053. This rule should be reciprocal.

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Stevens.

If a *feme sole* brings a suit, and marries, the statute provides that the husband may preserve her rights by entering his own name on the docket of the court, and giving bonds.—*Statute p. 96.* If the husband fails to enter in the action, the defendant may enter a certificate of the marriage, and have a judgement for costs.—*Statute p. 97.*

*Mr. Blackmer, for defendant.*—Defendant contends there is no error in the record. It is provided by statute that if a *feme sole* plaintiff shall marry pending a suit, such suit shall not abate, but the husband may join with the wife, and may enter upon the docket a certificate of the marriage; and if they do not, the defendant may enter such certificate; and in that case judgement shall be rendered for the defendant. If neither plaintiff nor defendant comply with the statute in entering a certificate of the marriage agreeably to the statute, it is believed the case must be governed by the principles of the common law. A man shall never assign for error that which he might have pleaded in abatement.—*Carthew, 124, Coan vs. Bowles et al.; 2 Saund. 101; 2 Bac. Abr. 492.* If a plaintiff take husband during the pendency of a suit, the defendant cannot give her coverture in evidence under the general issue, but must plead it in abatement.—*6 Term. Rep. 265, Morgan vs. Painter; 1 Swift, 791; 1 Vt. Rep. 14, Herring vs. Selden.*

The opinion of the Court was delivered by

WILLIAMS, J.—The plaintiff in error asks to set aside the judgement of the court below for an error in fact. It appears that after the commencement of the suit in the name of the defendant in error against the plaintiff, *Bates*, the defendant in the suit below appeared, and pleaded the general issue—that during the pendency of the action the plaintiff in that suit intermarried with one French, on the 10th of September, A. D. 1829—that after this, at the April term, in 1830, a trial was had on the issue before mentioned, and a judgement rendered thereon against *Bates*, which he reviewed. At the September term of the court in 1830, a final judgement was rendered against him on default, in the name of the said *Lydia Stevens*, the defendant in error. The question submitted is, whether a judgement in the name of a *feme covert*, without her husband, is erroneous, and whether such judgement can be reversed on a writ of error?

It is laid down in general terms in *Tidd's Practice, 2 Vol.*



1107, that the coverture of the plaintiff or defendant, at the commencement of the suit, is ground of error. This can only be true, when the judgement is against the person under coverture, and she and her husband bring the writ of error to set it aside. The form in the appendix to *Tidd*, to which reference is had, shows that he referred to a case of this kind. In the case of *Coan vs. Bowles et al., Carthew*, 123, it was decided, that if a married woman commence an action against any one, and the defendant plead in bar, he shall never after assign this marriage for error; for it was his folly not to have availed himself of it in season by pleading it in abatement. This principle has never been controverted; but the case has ever been recognized as an authority by *Bacon*, and also by *Swift*.—*Swift's Dig.* 1 vol. 791.

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The coverture of the plaintiff may be pleaded in abatement; and, if it takes place after the commencement of the suit, must be pleaded in abatement, and cannot be given in evidence under the general issue. In a case in *Shower*, 171, it was decided by *Holt, C. J.*, that if a *feme covert* bring an action as a *feme sole*, and defendant pleads in bar, he shall never assign this for error.

It is said there is this distinction between the cases where the coverture of plaintiff was before or after the suit commenced: that coverture before the commencement of the suit may be pleaded at any time, because the suit is thereby in fact abated; but coverture after suit brought must be pleaded *post ultimam continuationem*.

Inasmuch as the plaintiff rightfully commenced the action, the defendant may waive any advantage on account of the coverture, and plead any defence which he has; and if he does not plead it after the last continuance, he relies on his first plea, and waives all advantage by reason of the coverture. But coverture, either before or after the commencement of the suit, must be pleaded in abatement if the defendant means to take any advantage of the same.—*Milner et al. vs. Milner et al.* 3 Term Rep. 627; *Morgan vs. Painter*, 6 Term Rep. 265.

On this principle it was held in a case in *Bulstrode*, that if a *feme* marry after verdict and before judgement, she shall notwithstanding have judgement, and the defendant cannot plead this coverture, because he has no day in court to plead it, i. e. to plead it in abatement, as a verdict had been already given.

As the marriage of this defendant in error took place after the action was commenced, it was a proper subject for a plea in abate-

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ment. It was in the power of the plaintiff in error by such a plea to have availed himself of any advantage which the law gave him ; but as he neglected to avail himself of this advantage in due season, went to trial on the general issue, and finally suffered a judgement against himself by default, he must acquiesce in the judgement, and cannot assign this coverture for error ; for both reason and authority concur in saying, that a man shall never assign for error that which might have been pleaded in abatement. —2 *Bacon*, 492.

We have considered this case without reference to the statute of this state, because, as neither party have availed themselves of the provision of the statute, this case must be decided as though no such statute was in existence.

The statute provides, that the husband may join with the wife in prosecuting a suit commenced by her under certain regulations as to cost ; but he must cause his name to be entered as plaintiff, and lodge a certificate of his marriage with the clerk, on or before the *third day of the term*, next after the marriage. If he fails so to do, the defendant may, at any time thereafter, *during the term*, file a like certificate, and shall thereupon be entitled to a judgement against the husband and wife for the costs of the suit. After the term closes, neither party can avail themselves of the provisions of the statute, but the suit must go on as at common law without any benefit to be derived from the statute.

We find there is no error in the judgement of the county court, and the same must be affirmed.

HUTCHINS AND PICKET vs. MILLS OLCUTT.

ORANGE,  
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1832.

The accepting of a negotiable promissory note in payment of an account for labor bestowed on any article, is such a manifestation of the intention of the party taking the note to rely on the personal security of the maker of the note, as to be a waiver of any lien which he might have had on the article on which the labor was bestowed, whether such note was given at a future time, and whether negotiable or not.

The taking such a note on the property of

the maker, which the law gives as a charge on it.

In such case the lien to whom it may be payable.

and follow it into the hands of any one to whom it may be attached to it even in the hands of the

A promissory note given in payment of an antecedent account, is a bar to an action on that account, whether the note be paid or not.

If a person accept a note in satisfaction of his debt, he is paid by his own agreement, and cannot sue for his original debt, if there be no fraud or deception in giving the note.

Where one received a promissory note on settlement of an antecedent account, and wrote thereon, "Received payment by note," and delivered the account so receipted to the debtor, it was held that the receipt was *prima facie* evidence of the payment of the account.

This was an action of *trover* for two boxes of pine boards. Plea, the *general issue*. On the trial the plaintiff adduced evidence tending to show, that one Slyfield in the fall of 1828, procured a large quantity of pine lumber to be sawed at the defendant's mills, on Connecticut river, below Hanover; that part of said lumber belonged to Slyfield and one Little, and the remainder belonged to Slyfield and one Gregory; that the defendant resided at Hanover, and Slyfield, Little and Gregory resided at Haverhill, all in the state of New-Hampshire; that Slyfield in the month of December, 1828, after the lumber was sawed, and while it continued at the defendant's mills, and in his possession, sold his part of it to the plaintiffs; that after the sale, on the 12th day of December, 1828, Slyfield called on Olcott to settle for the sawing, and on that occasion Slyfield executed and delivered to Olcott two notes, one signed by himself, for himself and Little, to the amount of the sawing of the lumber belonging to Slyfield and Little, and also gave a note signed by himself, for himself and Gregory, for the amount of the sawing of the lumber belonging to Slyfield and Gregory; the notes were payable on demand to Olcott, or order; and on that occasion Olcott gave Slyfield a bill of the sawing receipted under his hand, as follows, to wit: "Received payment by note;" that in May, 1829, the plaintiffs proceeded to raft the lumber, when the defendant retained two boxes thereof for sawing, until the same should be paid, and for

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which this action was brought. The defendant adduced testimony tending to prove, that the lumber had ever continued in his possession from the time of the sawing until the time of detaining the two boxes; that said notes had not been paid or negotiated. The court charged the jury, plaintiffs were owners of the boards in question, who procured them at Slyfield's mills, and that afterwards Slyfield sawing, by giving the two notes to the defendant, he was liable for all the lumber sawed upon the defendant's receipt, and proved, that the defendant receipted his bills of lading for the lumber sawed, and the defendant had no longer a lien on the boards for his services; that the defendant by receiving said notes in payment, as his receipt states, for the sawing, he waived his lien upon the boards; and whether the notes were ever paid or not, the lien would not subsequently attach by the plaintiffs suffering their boards to remain in the defendant's mill yard.

A verdict being returned for the plaintiffs, the defendant filed exceptions to the charge of the court, and removed the cause to this Court, and prayed for a new trial.

After argument by *Mr. Collamer*, for defendant, and by *Mr. Burbank*, for plaintiffs.

The opinion of the Court was delivered by

**WILLIAMS, J.**—The defendant claims a right in this case to detain the lumber for which this action was brought, until he is paid a sum of money due to him from the firm of Slyfield & Little and Slyfield & Gregory, for sawing the same. The case presents the following questions.

1. Whether a person has any lien on lumber, sawed at his mills, for the sawing.

2nd. Whether the lien, if any existed, was waived by accepting the negotiable promissory note of Slyfield in payment of the account for sawing.

3d. Whether the demand, for which the lien is claimed, was paid by the promissory note.

\* The two last questions are in some measure the same, and as it respects the plaintiffs, if either are decided in their favor, it is immaterial how the other may be considered.

On the first question the views of the Court are not all alike,

and a decision of it becomes unimportant from the conclusion to which we have come on the other points of the case.

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In New Hampshire it has been decided, in a case relating to the mills of the defendant, where this lumber was sawed, that the owner of the mills has a lien on the lumber there sawed, for the price of the labour bestowed.

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Admitting that such lien does exist, it is what the law denominates a particular lien, for the value of the labor bestowed on the property in question, arising either from the common law, or particular usage.

I am not aware that the second question has ever been directly decided, and probably a decision either way, upon the particular facts in this case, could be supported by the reasons adopted by the Judges, if not by their decisions, in some of the cases which have been adjudged. I think however this general principle may be inferred from all the cases ; that the right of lien accompanies an implied contract ; that whenever there is an antecedent contract inconsistent with the existence of such right, or when the implied contract is extinguished, either no right of lien attaches in the first instance, or is waived in the last.

In relation to particular liens, like the one under consideration, it was given in the first place in, and probably confined to, those cases where the law created an obligation on the person to receive the goods of another and be at some expense about them. The right has been extended to those cases where goods have been delivered to a tradesman for the execution of the purposes of his trade, and the benefit of this right has been claimed and allowed by many trades which were unknown to the common law.

This right formerly was not considered as existing, where there was an antecedent agreement for the labour, although such agreement extended no further than merely to fix the price for the same. Thus it was decided, that if a man put cloths to a tailor to make, the tailor might detain them until satisfied for the making ; but if a contract was made that he should have so much for making, he could not detain them.—2 Ro. Ab. p. 92. The case of *Brenan vs. Currint, Sayer*, 224, was decided upon this principle. The authority of this latter case, however, has been questioned several times.—*Hutton vs. Bragg*, 7 Taun. 14 ; and was expressly overruled in the case of *Chase vs. Westmore*, 5 M. and S. 180.

Still, it is considered, that if there is a special contract for a

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particular time, or mode of payment, the workman can set up no claim inconsistent with the terms of such contract.

In the case of *Stevenson vs. Blacklock*, 1 *M. and S.* 535, *Lord Ellenboro'* says, that, when there is an express antecedent contract between the parties, a lien, which grows out of an implied contract, does not arise.

And in the case of *Cowell vs. Simpson*, 15 *Ves.* 275, the *Lord Chancellor* considers the right of lien as a right accompanying an implied contract.

From these cases it may be inferred, that if there is a special contract to accept of a particular mode of payment of a demand, to which a right of lien would otherwise attach, or to give a time or credit for the payment, that a claim to detain the possession until the payment is made, would be inconsistent with such contract, and could not be maintained. We think it will follow from this, that if the agreement was to receive the note of the debtor in payment of such demand, there could be no lien after such contract was complied with and the note given.

The question then will arise, whether, if there is no such antecedent agreement, the right of lien will be waived by taking such note afterwards; and here it must be admitted that the authorities are not explicit upon this subject, and that the remarks which have fallen from different judges and chancellors cannot be always reconciled.

In regard to the equitable lien the vendor of real estate has for the purchase money, which, though founded in natural equity, results, as it has been said, out of the law of the court of chancery, (a lien which has not as yet been contended for in this state, to my knowledge,) it has been a question much agitated, whether taking a bond or bill for the purchase money is a waiver of the lien. It was decided by *Lord Ashley* in the case of *Fawell vs. Heelis*, *Amb.* 724, that taking a bond for the consideration money, on the sale of real estate, was a satisfaction of the purchase money, and that the vendor had no further lien against the creditors of the purchaser. It has always appeared to me that the arguments in that case in favor of that position were very satisfactory. It has however been considered differently in other cases. In *Macreath vs. Symmons*, 15 *Ves.* 328, *Lord Eldon* reviews all the cases and comes to the conclusion that there is no inflexible rule, that where the vendor of an estate takes a security for the consideration, he has no lien, but that it must depend on the intention of the vendor to relinquish the lien and rely on the personal credit

of the individual, giving the security ; and this to be learned from the circumstances, of which the nature of the security is evidence. He very justly remarks upon this, that a vendor taking a security cannot know the situation on which he stands without the judgment of a court, as to how far the security taken does contain evidence of his manifest intention upon that point. *Sugden*, in his law of vendors, says, that where a security by bond, or note, is given, and it is intended that the vendor shall not have a lien on the estate for the money, a declaration to that effect should be inserted in the conveyance. If this lien should ever be contended for in this state, and adopted, it will probably be found necessary, especially under our recording system, that a declaration, that the vendor relies on such lien, should be inserted in the deed of conveyance, or that it should be considered as waived. *Chancellor Kent* considers that taking a note, bond, or bill, with *distinct* security, extinguishes the lien, or taking the responsibility of a third person.

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The examination of the law upon the subject of this equitable lien, leaves us still in doubt as to the effect of taking a negotiable promissory note for the purchase money, on the lien. It was once considered as extinguishing the lien altogether. But as it is now considered, that the waiving the lien depends on the intention of the vendor, as manifested by the security taken, it may be considered as undecided ; and no case directly in point can be found. The case of *Grant vs. Mills*, 2 *Vesey and Beams*, 306, comes the nearest to this question of any one which I have found. The authority of that case, however, is doubted by *Chancellor Kent*, 4 *Cow.* 147.

In relation to the lien which an attorney has on the papers of his client, it has already been remarked, that it has been considered as a right accompanying an implied contract. It would follow from this, that if the implied contract is extinguished, or if a special contract is substituted in lieu of the implied contract, the right of lien which accompanies the implied contract, is also extinguished, or waived. Thus in the case of *Cowell vs. Simpson*, 15 *Ves.* 275, it was decided, that the lien of a solicitor on papers was superceded by taking security. The Lord Chancellor places it upon the ground, that by taking a security, the lien is gone, and cannot accompany that special security which determines the implied contract, that if the right "commenced under an implied contract, and afterwards a special contract is made for payment, in the nature of things, the one contract destroys the other."



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And in the case of *Stevenson vs. Blacklock*, before mentioned, where *Lord Ellenborough* seems reluctant to assent to the general principles of the case of *Cowell vs. Simpson*, yet speaks of the right of lien as growing out of an implied contract, and lays stress in that case upon the fact, that the implied contract on his *quantum meruit*, and his lien, was not affected by his forbearing to sue. Of this case it may be remarked, that it did not involve the question, whether taking securities destroys a lien, which had previously been acquired. The paper, which the defendant claimed a right to detain, did not come into his hands until after the bills which he had received for his professional business had been dishonored ; and the cause seems to have been decided upon the ground, that those bills did not extinguish, or were not received in payment of, the balance due to the defendant.

If the subject of waiver as to this species of lien was to be placed on the same ground as it is in regard to the equitable lien of the vendor of real estate for the purchase money, to wit, the intention of the vendor, it then would be important, that the court should determine, in certain cases, what should be evidence of such intention. Otherwise, it will be found that it will be attended with the same inconvenience suggested in relation to those liens, viz. that the vendor and vendee must await the judgement of the court to know whether the security or contract taken, is to be considered as plenary evidence of the waiver of such lien.

To avoid any inconveniences of this kind in regard to that species of lien which is contended for in this case ; considering also, that the accepting of a negotiable promissory note is an extinguishment of any implied contract, on the part of the maker, to pay the consideration for which the note was given, we are disposed to say, that the accepting of a negotiable promissory note in payment of an account for labour bestowed on any article, is such a manifestation of the intention of the party taking the note to rely on the personal security of the maker of the note, as to be a waiver of any lien, which he might have had on the articles on which the labour was bestowed, whether such note is payable on demand or at a future time, and whether negotiable or not ; that the taking such note is of itself a waiver of any lien, which the law gave as a charge upon the property, on which the labor was bestowed ;— that the lien cannot attach to the note, and follow it into the hands of any one, to whom it may be negociated, and shall not attach to it, even in the hands of the payee.

On the third question, which arises in this case, which is in

some measure involved and has been considered in the other, our views are against the defendant. On the question, whether receiving a promissory note shall be considered as payment of an antecedent account, different decisions have been had in different states. It will not be of any importance to examine them particularly here. The rule of law undoubtedly is, that a promissory note, given and received in payment of an antecedent account, is a bar to an action on that account, whether the note be paid or not,—that if a person accept a note in satisfaction of his debt, he is paid by his own agreement, and cannot sue for his original debt, if there was no fraud or deception in giving the note.—*Harris vs. Johnston*, 3 Cranch 308; *Sheeley vs. Mandeville et al*, 6 Cranch 253; *Parker vs. United States*, Peters' C. R. 262. This is recognized as the law in New-Hampshire; 1 N. H. Rep. 281, *Wright vs. \* \* \* \* \**; and would be fatal to the claim of the defendant in that state, where this contract was made, and where this right of lien is said to exist, even if a different rule of law had obtained in this state.

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The general received opinion in this state has been, that a note thus received was payment; and we are all agreed, that the receipt attached to this account was *prima facie* evidence of the payment of the account.

If there was any fraud or misrepresentation on the part of the person giving it, to induce the defendant to receive it in payment; or if there was an ignorance, on the part of the person taking it, that any other person was holden, whose name did not appear, and in consequence of this ignorance the note of an insolvent partner, or joint contractor, was taken in payment of a demand against a firm who were responsible, the presumption arising from the receipt might be done away, and a recovery had against the persons originally liable on the account; but there is nothing of that in this case.

If the account of the defendant for sawing the lumber was paid, he could have had no further right of lien on the lumber for the sawing, especially against these plaintiffs, who had purchased the same of the original owners.

The judgement of the county court must therefore be affirmed.  
*Burbank*, for plaintiff.


*Collamer*, for defendant.

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JOHN L. WOODS, *Administrator of WILLIAM EAMES, vs. PET-  
TIS, TARBILL & Co.*

Where a claim is wholly founded upon a matter of record, and exists only as a matter of record, the action to recover it must be debt and not assumpsit.

Assumpsit will not lie to recover a sum found due by the commissioners appointed to examine and adjust the claims against an insolvent estate.

 This was an action of *assumpsit*, brought to recover a sum found due against the defendants by the commissioners appointed to receive, examine and adjust, the claims against the estate of *William Eames*, and the claims exhibited in offset thereto. The declaration also contained a count for goods sold and delivered to the defendants, in the life time of *Eames*.<sup>1</sup> The action was commenced before a justice of the peace, where the defendants pleaded in offset a claim on book account against *Eames*; and a judgement was rendered against the plaintiff for a small balance. The plaintiff appealed to the county court, where a judgement was rendered for the plaintiff for the amount found due to the estate by the commissioners. The defendants moved that the judgement be arrested on the ground that the action should have been debt, and not assumpsit. The court arrested the judgement: whereupon the plaintiff excepted, and brought the case up to this Court for a revision of that judgement.

WILLIAMS, J., delivered the opinion of the Court.—The defendants having a claim against the estate of *William Eames*, to which the plaintiff was administrator, presented the same for allowance to the commissioners appointed to receive, examine and adjust the claims of the creditors to the said estate. The commissioners on examination of the claims, both for and against the estate, found a balance due to the estate from the defendants. The commissioners made their return to the court of probate of the claims by them allowed, both for and against the estate, including, among others, the demand in favor of the estate against these defendants. No appeal was taken from their determination, and the plaintiff, as administrator, commenced this action of assumpsit to recover the sum found due as aforesaid, as well as other sums, which he claimed to be due from the defendants to the estate. A verdict having been found for the plaintiff, for the sum found due by the commissioners, the defendant filed a motion in arrest, and the judgement was arrested in the county court for the insufficiency of the declaration. Exceptions were taken to the decision of the county court, arresting the judgement, and the cause has

come to this Court. Several questions have been raised in the cause, which the court have not considered, as we are of opinion that the county court decided correctly in arresting the judgement, and their decision must be affirmed.

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By this finding of the commissioners, all claims existing between the defendants and the said *William Eames*, at the time of his decease, were adjusted, and were merged in the sum found by the commissioners. No claim could be made thereafter for any demands existing in the life time of *Eames*, either by the administrator, or the creditor, except to collect the sum found due, and adjusted by the commissioners. Hence the plaintiff could only bring a proper action to recover the sum found due to the estate, of which he was an administrator; and the question here to be determined is, whether assumpsit is the proper action in such a case.

We are sensible there are many cases, where either debt or assumpsit may be brought; but when the claim is wholly founded upon a matter of record, and exists only as a matter of record, the action to recover it must be debt, and cannot be assumpsit. The probate courts are expressly declared to be courts of record in this state, and are required to have a seal, and to keep a true and fair record of each order, sentence, and decree of said court, and of all things proper to be recorded. The evidence of this claim in favor of the plaintiff existed in the records of the probate court, and the claim arises wholly therefrom. The record is conclusive between the parties. No evidence can be admitted to controvert it. When produced, it is not evidence to be left to the jury; but the court must determine upon it as a matter of record, and no plea or issue could be formed which would refer it to a jury to determine upon its effects.

In any action which might be brought to recover it, *nul tiel record* would be a proper plea. If there was no such record, the plaintiff has no claim against the defendants for the sum sought to be recovered. If there is, he has a claim, which cannot be defended against by any thing arising anterior to the acceptance of the report of the commissioners. The action for this claim should have been debt, with a profert of the record, and assumpsit cannot be maintained.

The judgement of the county court must, therefore, be affirmed; and the defendants will be entitled to their costs accruing in this Court; but none in the court below.

*Underwood*, for plaintiff.

*Burbank*, for defendant.

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STUTSON WEST vs. ALVIN BOLTON.

Where a contract for the sale of a cow was made on condition that if the vendee paid for her the price stipulated, the cow was to be his, otherwise she was to remain the property of the vendor ; and the vendee took the cow, and used her as his own for three or four years, and in the mean time paid a part of the purchase money, which the vendor accepted ; but the vendee neglecting to pay the balance when requested, the vendor directed his son to take the cow away, which he accordingly did.— It was held in an action of trespass, brought by the vendee against the son of the vendor, for seizing and driving away the cow, that the title of the property was not vested in the plaintiff by the sale, and

That the vendor was a competent witness for the defendant to prove the contract of sale, even without a release, on the ground that he was a co-trespasser with the defendant.

This was an action of *trespass* for taking out of the plaintiff's possession a certain cow, which was alleged to be his property. Plea, the *general issue*, and notice that defendant would give in evidence that the cow, at the time of the taking, was the property of John Bolton, and that the defendant as the servant of said John, and by his directions, took and drove away the cow, as he lawfully might. It appeared on trial that in the autumn of 1826, the plaintiff contracted to buy the cow of said John Bolton, from whom he then received her, and kept and used her as his own, till the spring of 1830, when the defendant by direction of John Bolton, his father, took and drove her out of plaintiff's possession ; after which John Bolton sold the cow for his own benefit. The defence was, that the sale to the plaintiff was conditional, and not to take effect unless the cow was paid for ; that the price was \$18, of which the plaintiff had at different times paid \$10 ; that no note or other security for the price was ever taken—it being stipulated that in lieu of such security said Bolton was to have his security upon the property itself in plaintiff's hands, until fully paid for ; and that being unable to get the balance, after frequent demands of it, said Bolton re-took the cow in pursuance of his right under the contract. As a principal witness to make out this defence, the defendant called John Bolton, who admitted himself to have been chiefly interested in defending the suit, and that he had employed counsel : but he produced a release from the defendant. The plaintiff objected to the competency of the witness ; but the objection was overruled, and the witness admitted. His evidence tended to prove the contract, as above stated, on the part of the defendant, that the plaintiff was to pay the first \$10 in December after the purchase, and the residue in the following March ; that he paid the \$10 in two payments, neither of which was made till some time after the time agreed on ; but were ac-

cepted by Mr. Bolton without objection on that account ; that the balance had never been paid, though several times called for by an agent sent after it by Bolton, after it became due by the terms of the contract ; and that the cow was taken by defendant without the knowledge or consent of the plaintiff ; nor was the defendant directed by his father to give plaintiff any notice until after he had gotten possession of the cow ; but was directed then to give notice to the plaintiff, and leave the cow if the balance was paid. It did not appear that the \$10, received towards the cow had been refunded, nor that the plaintiff had otherwise made any compensation for the use of the cow. The court directed the jury, that if they found the above facts established by the evidence, the defendant was entitled to their verdict. Verdict and judgement for defendant.

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The plaintiff excepted, and the cause was accordingly brought up to this Court.

*Davis and Bell, for plaintiff.*—We have two grounds of exception to the decision of the county court on the trial of this cause : 1st. the admission of John Bolton, as a witness ; 2nd. the charge to the jury that plaintiff ought to recover, if they found the facts true as detailed in the bill of exceptions.

As to the first point, the case shows, that Bolton, the witness, sold the cow—received the ten dollars—sent requests for the price frequently—sent his son as his agent after the cow—received her from him, and sold her to some other person for his own benefit ; that he was chiefly interested in defending the suit ;—that he had employed counsel, and last, and not least, that the defendant, after pleading the general issue, gave notice to plaintiff, that the cow was the property of John Bolton, and that he acted as his servant, and by his directions. Under all these circumstances we contend he ought not to have been admitted, though released by defendant. Suppose it to be true, that a co-trespasser jointly interested in the trespass, and not joined in the suit, may be a witness, either for or against the plaintiff, on the ground that the judgement could not be used in evidence for or against him ; though there is much reason to doubt the correctness of this, yet we contend that such doctrine by no means warrants the decision in this case.—2 *Stark. Ev.* 764–8, 478 ; *Lethridge vs. Philips*, 2 *Camp.* 333 ; *Morris vs. Danbigny*, 16 *Com. L. Rep.* 402. It is true, there is no contribution in trespass : a recovery against one joint trespasser is a bar to any suit against the other, by either

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plaintiff or defendant. Such recovery may of course be used in his defence if sued by the same plaintiff. In this case, John Bolton was the sole person interested in the trespass, and the suit growing out of it: defendant was a mere servant, acting by his orders, and for the benefit of the witness. True, witness might have been joined in the suit, supposing the plaintiff to have known all the facts stated by witness. This case does not differ from that of a sheriff who attaches property by directions of a creditor on *mesne process*; and if this case was decided correctly, such creditor may always be a witness for defendant, not only as to the fact of taking, but as to ownership of the property, at least, after a release. Yet I believe no body ever thought of pushing the doctrine to that extent. From the pleadings here the court must regard the witness as the real defendant in interest. The essential matter in controversy is, whether he or plaintiff owned the cow, and the result determines that question. The witness is in truth made a party on the record by defendant's plea; and although no execution can issue for him or against him, yet he is not the less in interest.

2nd. It is also contended that the court ought to have charged the jury, that, supposing the facts sworn to by John Bolton to have been true, they amounted to a waiver of the lien originally created upon the cow; and he should have been compelled to resort to his contract for the balance due; or that, at all events, he had no right to take this property by violence without putting plaintiff in *statu quo*, by a return or tender of the money he had received. This point was directly determined in this court last March term—(*Johnson vs. Babbitt*), where Babbitt had an express lien for rents accruing on a farm let to Johnson, and went on, and took various articles, such as hay and grain, for which Johnson brought trespass, and recovered. In this case part of the rents had been paid. 4 *Dane*, p. 461; 5 *East*. 449, *Hunt vs. Sill*; 15 *Mass. R.* 319, *Conner vs. Henderson*; 4 *Mass. R.* 502, *Kimball vs. Cunningham*. These cases fully show that a party cannot rescind a contract, and yet retain advantages under it. If J. Bolton had received the whole eighteen dollars, it is agreed the sale would have been complete. Suppose he had received one dollar for seventeen successive years; would it be pretended he could retain this money, and forcibly possess himself of the cow for non-payment of the other dollar?—1 *Camp*. 427, *Payne vs. Shadbolt*; 4 *Mass. Rep.* 405, *Hussey et al. vs. Thornton*. This last case in the main asserts a proposition we do not contro-



vert; i. e., that property may be delivered in contemplation of sale, but subject to a condition afterwards to be performed. There can, however, be no doubt but this performance may be waived either expressly or by implication. It is in this latter mode that we contend Bolton waived a strict performance of terms on the part of *West*, and by accepting part payment afterwards sufficiently indicated his intention to sell without exacting full payment as stipulated. The above case is not at all inconsistent with this position. Indeed, Judge *Parsons* asserts, that if the seller, at the time of delivery, had forgotten to mention the security, the change of property would have taken place. Suppose that the condition, on which was to depend the change, were, that a note with good security should be executed for one half, and a payment in specific articles at a given time for the remainder. Now if the note were furnished, and the vendor should accept a portion of the articles at a day subsequent to the time of payment, could not the vendee regard the property as his till the last farthing was paid? That an attaching creditor or *bona fide* vendee would have held the cow against Bolton, there can be no doubt; and though we do not pretend that the vendee stands in so strong a right, still we think the circumstances so strong as to have well warranted him in considering the property his, and himself only liable for the balance of the price. The time of payment was specified, and the money paid long afterwards without objection, or intimation that he intended to hold the cow as security for the balance. Even supposing Bolton had a right to so much of the ten dollars as would pay a reasonable rent for the time the plaintiff had her; yet it should be remembered, in determining what that should be, that it was not a letting for rent, when the latter incurs all risk from accidents, and sustains all losses from depreciation of value from age, &c. Here *West* had no option; if the cow had died in one week, Bolton could have insisted upon the payment. The option was altogether his, and for his benefit, and made under such circumstances, the rent would not be more than legal interest on the price, or about one dollar per year.

*Mr. Chandler, for the defendant.*—By the evidence reported in this case it appears, that the sale of the cow from John Bolton to the plaintiff, was a conditional one. The payment of the \$18, was a condition precedent, upon the performance of which the property was to vest in the plaintiff. Until the performance of this condition precedent, no property could vest in him by vir-

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tue of this contract.—4 *Mass.* 405 ; 17 *do.* 611 ; 2 *Pick.* 512 ; 4 *do.* 449 ; *Long on sales*, 109 ; 2 *Kent's Com.* 391 ; 3 *Vt. Rep.* 161. There was no waiver of the condition by John Bolton. The fact that the property was suffered to remain in the possession of the plaintiff after the time limited by the contract for the payment of the balance of the purchase money, furnishes no evidence of such waiver in favour of the plaintiff, however the fact might be if this claim had been set up by a *creditor* of the plaintiff.

On the trial of this case, John Bolton was admitted as a witness, but objected to by the plaintiff. Of late years the courts have endeavoured as far as possible to let objections go to the *credit* rather than to the *competency* of a witness.—1 *Camp.* 145 ; 1 *D. and E.* 300 ; 3 *do.* 32 ; 1 *Philip's Ev.* 41 ; 2 *Starkie's Ev.* 392, and 764. The only objection to this witness must have been on the ground of interest. But this objection is entirely obviated by the release from the defendant. Without the release he would have been competent, his interest being against the defendant. The relation in which he stood to the defendant could only affect his *credibility*. This is a principle too well settled to be now contested. The case of *Hasbrouck vs. Town*, 8 *Johns.* 377 and the case of *Alderman vs. Terril*, 8 *do.* 418, (see 2 *Phil. Ev.* 140, *note*,) are both directly in point, and we find no case to the contrary. Upon the whole, it seems very clear, that the witness had no such interest in the event of this suit, as should render him incompetent, and that he was very properly permitted to testify in the case.

The opinion of the Court was given by,

WILLIAMS, J.—The possession of the plaintiff was sufficient, in this case, to enable him to maintain an action of trespass against any one except the owner, and those who acted under him. The defendant justified the taking the property, as the servant of John Bolton, the owner ; and to prove this justification, introduced the said John Bolton as a witness, he having first executed and delivered to him a release. The facts testified to by the witness were adjudged to be a full justification, if believed ; and the jury was so charged. Two questions are made ; 1st. Whether the facts testified to, were a justification ; 2nd. Whether the witness offered was a competent witness.

The testimony shows most unequivocally that the plaintiff had no property in the cow for which the suit was brought ; that the sale under which he claims, was conditional, that the property was

not to vest until paid for ; and that it had not been paid for in full. CALEDONIA,  
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 The plaintiff having failed to fulfil the conditions on the performance of which he was to have the property, all his claim at law was gone. Whether he had any equitable right, is not here the matter in dispute. The owner might retake the property again, and divest the plaintiff of possession ; and would not be guilty of any trespass in so doing. The performance of the condition was neither rescinded nor waived, but insisted on ; and it was in accordance with the contract, that the owner proceeded to take the property into his possession. As the plaintiff had not performed the condition precedent, on the performance of which the property was to pass from Bolton to him, the jury was rightly directed that the facts, if believed, entitled the defendant to a verdict.

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The next question is, whether the witness offered was properly admitted? The situation of witnesses, and the facts to which they testify, are frequently such as materially to affect their credibility. This is one of those cases. The credibility of a witness is, however, for the jury to weigh. As it is not pretended but that this witness had sufficient religious belief to know and feel the obligation of an oath, and had not been convicted of any infamous crime, it remains only to enquire, whether there was any objection to him on account of interest? for unless he is liable to some of those objections, there is no other ground on which he could have been rejected. There is no principle of policy, nor any thing arising out of the nature of the facts, he was called on to prove, which can operate to exclude, however they may throw a doubt on his veracity. Considering the witness offered as a co-trespasser, the authorities are, that he is a witness for the defendant. When a witness is excluded on account of interest, it is supposed that he derives a benefit by a recovery in favor of the party who calls him. But we can see no benefit which a cotrespasser acquires by a recovery in favor of the defendant ; it leaves him still liable to the plaintiff without any right to call for contribution.

In the case under consideration, if defendant went off justified and acquitted, in consequence of the testimony of this witness, the witness was left liable to the plaintiff for any action or claim which the plaintiff might be entitled to against him, for procuring the cow to be driven off, or aiding or assisting the defendant in taking her away.

Considering the witness as cotrespasser with the defendant he was a competent witness for him, without any release.

If a release was at all necessary, it must have been because the

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witness was supposed to be under some obligation to indemnify the defendant. If there was any such obligation, it must have arisen from the relative situation of the witness and the defendant, the former being the father, and the latter his son.

Whether this was any legal obligation in such a case or not, is of no consequence, as the defendant released the witness from any liability he might be under. On both points made in the case we are of opinion that the decision of the county court was right; and their

Judgement is, therefore, affirmed.



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### TOWN OF BARNET vs. TOWN OF CONCORD.

Where a *warning-out process* was issued directing the constable of a town to summon a man and his wife to depart said town, to prevent their gaining a legal settlement therein,—it was held that no service need be made on the wife, and that if the service was sufficient to prevent the husband from gaining a settlement, it, of course, prevented her.

Where a constable in his return on a *warning-out process* stated that he had served the precept by leaving a true and attested copy of the same at the last and usual place of abode of the person named in the warning, "with a person of discretion residing therein," with his return thereon endorsed,—it was held to be bad, because the name of the person with whom the copy was left was not mentioned, and because it was not stated that such person was one of sufficient discretion.

Where an order of removal is made agreeably to the acts respecting a *legal settlement and providing for the poor*, the copy, which is required by the 5th section of the act of 1817, to be left with the overseers of the poor of the town to which the pauper is ordered to be removed, must correspond with the original in every substantial part. If there is an omission in the copy which would be fatal, if it were in the original proceeding, the statute is not complied with.

The removal of a pauper cannot legally be made before the day fixed upon by the justices for the pauper to remove himself.

This was an appeal taken by the overseers of Concord from an order of removal of Abigail Emerson, Sally Emerson, Eluthera Emerson, and Darius Emerson, town paupers, made by two justices of the peace in and for said county of Caledonia. The appellants filed a motion to quash the proceedings of the justices, and alleged several causes; to wit:

1st. Because the justices making said order of removal did not examine the said paupers touching their ability and last place of legal settlement, nor for any other purpose. 2d. Because the said justices had not alleged in their order of removal that they examined the said paupers upon oath, touching their ability and last place of legal settlement. 3d. Because the officer who removed said paupers to said town of Concord, did not leave with either of

*said overseers of Concord* an attested copy of his said warrant. 4th. Because an attested copy of said order of removal was not left with either of the overseers of the poor of said Concord within thirty days after the making of said order, nor at any time since. 5th. Because the copy of said order of removal required to have been left with one of the overseers of the poor of Concord, does not direct the said paupers to remove to said town of Concord on or before the 2d day of March 1831; nor does said copy mention any day when said paupers should so remove. 6th. Because the warrant of removal was issued by the said justices, and the officer, to whom said order of removal was directed, actually removed the paupers to said town of Concord, before the time prefixed by the said justices for said paupers to remove themselves to said town of Concord, had expired.

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The motion to quash was overruled.

The officer's return on the warrant of removal was as follows, excepting the words in italics, which were omitted.

"*State Vermont,* } *Barnet, March 2, 1831.*—Then served this  
*Caledonia, ss.* } warrant by taking the bodies of the within  
 named Abigail Emerson, Sally Emerson, Eleuthera Emerson  
 and Darius Emerson, wife and children of John S. Emerson, late  
 of Barnet, deceased, together with their effects, and removed them  
 to Concord, county of Essex, to the house of John Wheeler, jr.,  
 in Concord, one of the overseers of the poor of said town, and  
 there left them, and left a true and attested copy of this warrant,  
*at said Wheeler's dwelling house in the care and possession of*  
*his father, then resident therein,* together with my return hereon  
 thereon endorsed. *Delano Cushman, authorized."*

The appellees requested the court to permit the officer, who re-removed the paupers to Concord, to amend his return on said warrant of removal by adding the words in italics. This was objected to by the appellants; but the court permitted the officer thus to amend his return on paying costs of the term, and taking no costs. The appellees contended that a copy of said order of removal was left with one of said overseers of Concord within thirty days from the order of removal; and offered in evidence a copy which did not name any day when said paupers should remove: to the admission of which copy the appellants objected; but the court admitted it, and overruled the motion to quash.

The appellants then pleaded, that the said paupers were unduly removed, because the town of Concord was not the place of the paupers' legal settlement; which issue was by agreement of the parties closed to the court. To support said issue the appellants gave in evidence a written statement of the facts made in said

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cause, signed by C. Davis, attorney for *Barnet*, and by D. Hibbard, jr. attorney for *Concord*, which was as follows :

“ That John S. Emerson was married in Waterford, 30th December, 1810, to Abigail Stevens, now the widow Abigail Emerson ; that in 1811, he removed with his family to *Concord*, and resided there, and paid taxes two years, without being legally warned out ; that he and his family then removed back to Waterford, and remained two years and over ; and that in the summer or fall of 1815, he removed with his family to *Barnet*, and continued to reside there till the last of June, 1827, when he died ; that his wife and family lived with him all the time, and that his widow has ever since continued to reside there until removed by the present order ; that no record was made in *Barnet* of his going to reside there in pursuance of the proviso of the 1st section of the act of Nov. 4th, 1817 ; and that none of the towns aforesaid ever furnished any support to Emerson or his family till this removal was made.”

The appellees offered in evidence a warning-out process of the select-men of the town of Waterford, which was as follows :

“ To either constable of the town of Waterford in the county of Caledonia, Greeting.

You are hereby required to summon John S. Emerson and Nabby Emerson, his wife, now residing in said Waterford to depart said town : hereof fail not ; but of this precept, and your doings herein, due return make according to law. Given under our hands at Waterford, this 16th day of January, A. D. 1811.

|                             |                                  |
|-----------------------------|----------------------------------|
| <i>Sylvanus Hemmingway,</i> | } Select-men<br>of<br>Waterford. |
| <i>Joseph Felch,</i>        |                                  |
| <i>Eben Farnam,</i>         |                                  |

*Caledonia, ss. Waterford, 20th February, 1811.*

Then served this precept by leaving a true and attested copy of the same at the last and usual place of abode of the within named John S. Emerson, with a person of discretion residing therein, with my return hereon thereon endorsed.

*Elijah Freeman, Constable.*

To the admission of this the appellants objected ; because the warrant was not served on both of the paupers, and because it was not stated with whom the copy was left ; but the court overruled the objection, and admitted the evidence. The appellees further offered in evidence a warning-out process of the select-men of *Barnet* ; to the admission of which the appellants objected ; because the warrant was signed by only two select-men ; but the court overruled the objection, and admitted the same. It was proved by the testimony of witnesses on the stand, that the pau-

per, Abigail Emerson, and her late husband, were married a short time previous to the warning-out in Waterford, at which latter period neither of them had acquired any settlement there ; that very soon after the warning, they removed from Waterford to *Concord*, where they lived two years or more, and then removed back into Waterford in the year 1813, where they continued to reside, without being again warned out, till the fall of A. D. 1815, when they removed to *Barnet* ; and within the year after the last removal the warning-out in *Barnet* took place. This proof, together with the two warning-out processes, above referred to, and the written statement of the counsel, also referred to, made all the evidence upon the question of settlement. The court adjudged that the paupers were duly removed. To which decisions of the court the appellants excepted, and removed the case to this Court.

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The cause was now argued by *Mr. Davis*, for the plaintiffs, and by *Mr. Hibbard*, for the defendants.

WILLIAMS, J., delivered the opinion of the Court.—In this case it appears there was a motion to quash the proceedings, which was overruled ; that an issue was joined, which was tried by the court. On the trial it appeared in evidence that John S. Emerson, who was the husband of Abigail Emerson, one of the paupers removed, and father of the others, removed into the town of *Concord* when the act was in force in relation to warning out persons to prevent their gaining a settlement, resided there over a year, and thereby gained a settlement for himself and family in *Concord*. In 1813 he removed to Waterford, and there resided over a year without being warned out. By this residence he gained a settlement in Waterford, and lost his settlement in *Concord*, unless he was prevented by a previous warning in Waterford ; for it appears, that previous to his going to *Concord*, he had resided in Waterford, where a warning issued against him and his wife, which was served on him. The effect of this warning, if regular, not only prevented his gaining a settlement in Waterford by that residence, but according to the authority of the case of *Ira vs. Clarendon, Bray*. 180, also prevented his gaining a settlement in the same town by any subsequent residence, while that act was in force. In 1815, Emerson and his family removed to *Barnet*, where they continued until June, 1827, when Emerson died. His widow and his children have since resided there,



**CALEDONIA**, until this order of removal was made. While they resided in *Barnet*, and before they had continued there a year, they were warned out of *Barnet*; and as this warning appears to be regular and unexceptionable, they acquired no settlement by that residence.

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The question in this case is, whether, they were settled in *Concord* or *Waterford*? and this depends wholly upon the sufficiency of the warning made by the town of *Waterford*.

The manner of serving this warning is described by the constable in his return, and is as follows: "By leaving a true and attested copy of the same, at the last and usual place of abode of the within named John S. Emerson, with a person of discretion, residing therein, with my return hereon thereon endorsed." As Abigail Emerson is described in the warning, as the wife of the said John S. Emerson, if the service is good so as to prevent him from gaining a settlement, it of course prevented her; and it was unnecessary to make any service upon her, although she was named in the warning.

But there is an objection to the service of this warning, which the Court have been called on to consider. It will be remembered that these warnings were to be served in the same manner as is provided for the service of writs of summons.

In deciding the cases which have arisen under the act in relation to warnings, courts have required a great degree of accuracy in the proceedings of the towns and their respective officers. This has resulted in a measure from necessity, and not altogether from the principle which is admitted and recognised of their being no equity between contending towns.

These warnings were required by the statute to prevent persons from gaining a settlement, and for no other purpose; and both the form of the warning and the manner of service were pointed out. They were not processes upon which any after proceedings were to be had. There was no court or tribunal to which they were to be returned, who were to exercise any judicial authority over them, or authorize any amendments, or the correction of any errors, which may have intervened.

The warning out was a mere act or ceremony designed for a single purpose. Any other ceremony, or any other mode of service of the warning might have been prescribed. But when this particular mode was prescribed, courts in judging upon it could do no otherwise, than to inquire whether it had been followed. Hence the inquiry has not been, whether the town had sufficiently

manifested their intention not to receive the persons warned, as inhabitants ; whether the persons can be presumed to have had notice of the warning ; whether a want of regular service had been waived or cured by any after proceedings ; but only whether the statute had been followed. Hence no amendments could be made in the warning, service, or certificates of recording ; and none has been admitted ; but the whole has been adjudicated upon as it was found on the public records of the respective towns. If a greater strictness has apparently been required in relation to these warnings, and the service of them, than is usually required in other processes, and the returns of services thereon, it is, because in other processes many defects, which are in reality departures from the law, are cured by appearance, or may be by amendment ; and on that account defendants have not thought it of consequence to notice them to the court, as they could be easily obviated by amendment.

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The defect in the return of service of this warning is one of that character. Had it been on a writ of summons, it would not have deserved notice, as the officer, by an amendment of his return, would probably have made it conformable to the statute.

Having nothing to guide us on this subject but the statute, we must have recourse to that ; and we there find that in serving writs of summons, it is required, that the officer serving the same shall deliver to the defendant a true and attested copy of the writ, with the officer's return thereon, or leave such copy at the house of his, her, or their, usual abode, with some person of sufficient discretion resident therein : and the manner of such service shall be particularly expressed in the return made by the officer.

It is a general principle in relation to all returns, that the officer must state what he has done, so that it can be determined from his return whether the requisites of the law have been complied with. And, inasmuch as the return is *prima facie* evidence of the facts therein stated, it should afford to the party affected by it an opportunity to traverse it directly, or to sue for a false return.

In the statute in question great care was taken that by no collusion or fraud officers could make a return literally true, and apparently in conformity to the statute, and yet, the defendant have no notice of the suit. This was rendered necessary by the frauds which had been practiced under the former statute, by persons specially deputed at the request of the plaintiff. Under a former statute it was only required that writs should be served by leaving a copy at the last and usual place of abode of a defendant. I

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recollect hearing a case investigated where a judgement was recovered against a man to a large amount, and the first notice he had of the suit was, when the officer called to levy the execution. On examining the records the writ appeared to have been regularly served, and it was not until after much investigation that it was ascertained that copies were left at the house of the defendant, but in such a situation that it was designed he should never find them.

As the officer must state in his return the manner of service, so that a defendant can directly deny the return, if it is not true, and if it is true, that it may appear the defendant had regular notice of the suit, it will follow, that if this is not done, the return must be bad. The return on this warning does not state the name of the person with whom the copy was left. How could a defendant deny that the person with whom the copy was left was of sufficient discretion, when the return does not inform him with whom such copy was left? How can it be ascertained that this warning was served by leaving a copy with a person of suitable discretion? How can that assertion contained in the return be denied, and met with proof? And again, this return may be literally true, though the copy was left with a child, or person of but very little discretion. The officer has undertaken to judge for himself in relation to the person with whom to leave the copy, and has left others, who may be affected by his return, no means of determining whether he judged correctly or not.

The case of *Reading vs. Rockingham*, 2 Aik. 272, has a very strong bearing on the question under consideration. The Court there remarked, that it was a material part of the statute, that the copy should be left with a person of sufficient discretion, and which if not done, would vitiate the service; but as the person with whom the copy was left *was named*, though it was not added, that he was a person of sufficient discretion, the Court were inclined to think a defendant could avail himself of any advantage he was entitled to, either by an action against the officer, for omitting to perform his duty, or by an action for a false return, and that no additional burthen was cast upon the party in making the proof.

But when the person is not named, no action can be sustained for a false return. And unless we consider it the duty of the officer to name the person, for omitting which he would be liable to an action, a defendant would have no remedy against him when he had violated the spirit of the law in every essential particular.

The case of *Dodge vs. Pierce*, decided in Franklin county,

January, 1831, recognizes the principle on which the decision of this case is made, very fully.

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On an examination of the statute, and on a review of the decisions which have been made thereon, we are of opinion that the service of this warning was defective, inasmuch as the constable has not stated the name of the person with whom he left the copy, and that he was a person of *sufficient* discretion, and has not given any means by which it can be decided whether he left the copy with a person of discretion.

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It is unnecessary for us to decide the other questions which have arisen in this case, as to the effect of the residence of the pauper in *Barnet*, while under coverture, and since, though we are inclined to the opinion, that such residence did not give her a settlement in *Barnet* under the statute of 1817. The paupers were unduly removed to *Concord*, as they acquired a settlement in *Waterford* subsequent to their settlement in *Concord*. This will entitle the defendant to a new trial if he so elects.

There was also a motion to quash the proceedings in this case, which the Court must decide upon, as the town of *Concord* may still insist upon this motion.

The four first exceptions on which the motion is founded are not considered of any importance, and were properly decided by the county court. The fifth and sixth are of more consequence.

The fifth section of the statute of 1817 requires that a true and attested copy of the order of removal should be left with one of the overseers of the poor of the town to which the removal is made within thirty days after making the order. This copy should correspond with the original in every substantial part. If there is an omission in the copy which would be fatal, if it were in the original proceeding, the statute has not been complied with. There was such an omission in the copy which was left with the overseers of the poor of *Concord*, and they might have considered, that, if the original order was similar to the copy, it was defective, and on that account have neglected to take an appeal. They may here insist on this defect in the copy on this motion to quash.

The proceedings were also irregular in removing the paupers before the day given them by the court to remove themselves. The paupers might have gone out of the state, and have been no further chargeable to any town. The constable had no right to remove them before the day set for them to depart.

These proceedings were irregular in these particulars, and ought to have been quashed. The judgement of this Court,

**CALEDONIA**, therefore, will be, that the judgement of the county court is reversed; that the proceedings be quashed, and the town of *Concord* recover their damages and cost, unless they elect to take a new trial upon the merits, waiving any advantage on account of these irregularities.

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**CALEB WRIGHT vs. ELISHA ALLEN.**

Where the payee of a promisory note received from one of the signers an order on a third person for a portion of the note, which order, if accepted and paid, was agreed to be in full satisfaction of all claims against such signer on said note, and the payee was to look to the other signer alone for the residue, — it was held in an action afterwards brought by the payee against the signer from whom the order had been received, that the receiving the order, as above mentioned, was not a valid defence to the action, although the order were paid by the drawee, or he were prevented from paying it by the misconduct of the plaintiff,

This was an action on note, dated August 20, 1823, for \$34, payable in cows in four years from date, signed by defendant and Ira Allen. *Plea, general issue.* On trial the defendant introduced evidence tending to prove, that in February, 1829, the plaintiff was at the house of the defendant, in Salisbury, with the note in question, and that he then and there verbally agreed with the defendant, that, if the latter would draw an order for ten dollars in favor of the plaintiff, upon one Cady, living in the state of New-York, and not many miles from the plaintiff's place of residence, the plaintiff would cause said order to be immediately presented to Cady for acceptance, and if accepted and paid, it should be in full of all claims of the plaintiff against the defendant on said note; and that plaintiff would execute and leave with Cady a discharge of defendant upon said note—the plaintiff reserving the right to collect the balance from Ira Allen, the other signer, and engaging to look to him alone for the same;—that the defendant did accordingly draw said order on Cady, which the plaintiff received and carried away, together with the note. Evidence was also given tending to show the defendant's ability to pay said note, and that Ira Allen was understood to be poor; and that defendant insisted it was the proper debt of Ira Allen to pay. Evidence was also given to show that defendant had effects in the hands of Cady sufficient to answer said order; that the plaintiff did not present the order to Cady for acceptance, until several months after he received it, and then signified to Cady his wish that it might not be accepted; and that Cady for a time hesitated, and rather declined to accept it, saying he did not know

how accounts stood between him and the defendant—being induced thereto partly by this suggestion of the plaintiff—but that he soon after sent word to the plaintiff that he would accept and pay the order ; but it was not again presented. Evidence was also given tending to show, that shortly before this action was commenced, the plaintiff by his agent offered to return, and tendered, the order to the defendant, who refused to receive it. Whereupon the defendant contended, and requested the court to charge the jury, that these facts, if proved, operated to discharge the defendant from the note, and entitled him to a verdict. But the court instructed the jury, that the facts aforesaid, however well established by proof, did not discharge the defendant, nor entitle him to a verdict ; but that the jury were at liberty, in computing the damages, to deduct the amount of the order and interest thereon, if they found that Cady had funds of the defendant sufficient to pay it—and that the non payment of it had been caused by the act or neglect of the plaintiff. The jury returned a verdict for the plaintiff, deducting the order as above instructed.

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The defendant excepted to the charge of the court, and brought the cause to this Court for a new trial.

After argument by counsel,

The opinion of the Court was delivered by

WILLIAMS, J.—The question in this case is, whether the verbal agreement of the plaintiff to accept an order on Cady for ten dollars, should be in full of his claim on the note declared on, which was for a larger sum ?

To give it this effect, it must be considered either as an accord and satisfaction, or in the nature of a release. The first enquiry is, can the agreement and the subsequent proceedings be considered as an accord and satisfaction, as the defendant contends ? Upon this point there can be no doubt. The very terms of the agreement exclude the idea of the order being received in satisfaction. A satisfaction received, or an accord and satisfaction executed, would be a discharge of the demand itself, and would equally avail either of the signers of the note ; whereas no such result was contemplated or intended ; moreover, it was expressly agreed that it should not so operate.

Without enquiring, therefore, whether the agreement has been executed, or whether the order has been accepted and paid according to the terms of the agreement, or whether, if the payment and acceptance was prevented by the misconduct of the plaintiff,

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as to him, it should be considered the same as if accepted and paid, or whether a verbal agreement to accept a less sum can, in any case, be insisted on as a satisfaction even though it has been received in pursuance of such agreement. We decide, without any hesitation, that here was no accord and satisfaction, which can avail the defendant, as a discharge of the note. Neither can this agreement be considered in the nature of a release; as an agreement, not to sue it, was void for want of consideration. A covenant, not to sue, may, in some cases, operate as a release; but a covenant is supposed to be founded on a consideration.

On both grounds taken by the defendant, we think he must fail, and that the judgement of the county court was correct. This question was decided in a case very similar to the one under consideration, *Harrison vs. Close and Wilcox*, (2 Johns. 448.) It was held in that case, that a payment by one of two joint promissors of a part of a note, and an agreement by the payee, that in consideration of such payment he would not call on him for the payment of the note, but would collect the residue of the other promisor, was no bar to a suit against both on the note, but that the agreement was a *nudum pactum*. This same principle was decided in the case of *Seely and others vs. Spencer*, (3 Vt. Rep. 338,) a case very analogous to the present.

The judgement of the county court, must, therefore, be affirmed.

*Woodbridge & Bradley*, for plaintiff.

*Doolittle & Briggs*, for defendant.



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### TOWN OF BARRE vs. TOWN OF MORRISTOWN.

Where a constable in his return on a warning-out process stated he had served the same by leaving a true and attested copy at the dwelling-house of the person named in the process, without stating with whom, or in what situation, he left the copy,—it was held that the warning was insufficient.

Where the overseers of the poor of the town of B, under the supposition that certain paupers residing in the town of M, had a legal settlement in B, supported the paupers for a time in M, and afterwards carried them to B, and supported them there for a long time,—it was held that these proceedings of the overseers of B, though legal evidence, were not conclusive that the paupers were legally settled in B.

And although in such case the overseers be empowered by the town to use their discretion with regard to the paupers, they cannot by such proceedings change the place of settlement of the paupers.

To make an order of removal of a pauper conclusive between the towns who are parties thereto, and also as to all others, it must be perfected by giving the notice required by the statute, that is, by leaving a true and attested copy within thirty days after the order of removal is made; and this notice cannot be waived, so as to affect the settlement of the pauper, by any agreement of the overseers of the town entitled to receive it.



This was an appeal from an order of two justices of the coun-<sup>WASHINGTON</sup>  
ty of Washington for the removal of Thomas Brigham, Sally Brig-<sup>March,</sup>  
ham, his wife, and Lucy L. Brigham, their daughter, from *Bar-*<sup>1832.</sup>  
*re* to *Morristown*. Plea, that the paupers were unduly removed,  
because their last legal settlement was not in *Morristown*. Up-  
on which issue was joined. On the trial it was admitted by the  
parties, that the paupers removed to *Morristown* in 1814, and  
resided there till about the first of January, A. D. 1824—and that  
previous to their so going to reside in *Morristown*, their legal set-  
tlement was in *Barre*. The defendants then offered in evidence  
the record of a warning relating to these paupers and several  
other persons, issued by the selectmen of *Morristown*, dated De-  
cember 23d, and served and recorded December 30, 1814; to  
which the plaintiffs objected for the insufficiency of the officer's re-  
turn thereon, which was as follows :

*State of Vermont,* } *Morristown*, December 30th, 1814. By  
*Orleans County, ss.* } virtue of the within summons I served the  
same by leaving a true and attested copy at the dwelling house of  
the within named Thomas Brigham with my return thereon en-  
dorsed.

Attest, *Jona. Cooke, Constable.*

The record was accordingly rejected by the court. The de-  
fendants then gave in evidence an order of two justices of the  
county of Orleans, dated December 25, 1823, for the removal of  
the paupers from *Morristown* to *Barre*, with the complaint, pro-  
cess, and proceedings connected therewith. It was not shown, nor  
pretended, that any copy of this order was delivered to any of the  
overseers of *Barre*, nor that the order was executed by a removal  
of the paupers under it ; but in aid of said order, and with a view  
to make it conclusive upon the question of settlement, the defen-  
dants offered parol evidence to prove the following facts : That  
for a considerable time previous to the making of said order the  
overseers, as well of *Barre* as *Morristown*, supposed the settle-  
ment of the paupers was in *Barre*, and that communications pas-  
sed between them upon that supposition ; that in June, A. D.  
1823, the overseers of *Barre* went to *Morristown* to look to the  
situation of the paupers ; and finding them sick and unable to be  
removed at that time, they requested the overseers of *Morris-*  
*town* to provide for them, and promised to pay the expences ;—  
that in July, 1823, the subject of said paupers was referred by  
*Barre* to the discretion of their select-men, being also the over-  
seers, as by a vote of said town, passed February 12th, 1823, offer-  
ed in evidence ; that immediately after the order was made, one

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of the justices wrote to the overseers of *Barre*, informing them of the order ; that in consequence of that information, the overseers of *Barre*, about the 1st of January, A. D. 1824, went to *Morristown*, when they had full notice of the order and previous proceedings, and requested that the order might be no further prosecuted, declaring their full conviction that the paupers belonged to *Barre* ;—that they therefore paid to the overseers of *Morristown* the costs which had accrued in the proceedings—being about \$10,00—and carried the paupers to *Barre*, where they were supported by the town as paupers until the present order and removal were made. To the admission of this evidence, the plaintiffs objected, and the same being rejected by the court, a verdict was returned for the plaintiffs. To these decisions of the court the defendants excepted, and the case was reserved for the opinion of this Court.

*The counsel for the defendants* contended, that the previous order of removal from *Morristown*, under the circumstances of the case, was conclusive upon the town of *Barre*.

1. That no undue advantage might be taken of the town to which a pauper should be ordered to remove, the 5th section of the act of 1817, (*Stat.* 383,) provides, “that whenever any order of removal shall be made, &c., an attested copy of such order shall be left with some one of the overseers of the poor of the town to which said pauper shall be ordered to remove, within thirty days after the making of such order.” The principle object of this section of the statute is to give seasonable notice of such order to the town to which a pauper is ordered to remove, that if the overseers of the poor of such town should feel themselves aggrieved by such order, they might take their appeal to the next county court, as is provided by the 6th section of the act of 1797, (*Stat.* 371.) But notwithstanding the positive words of this statute, it was decided in the case of *Bradford vs. Corinth*, (1 *Aikens*, 290,) that if the appeal was entered within the thirty days, no exceptions could be taken by the appellants, on account of the neglect of the appellees to give such notice : and the court would presume notice to be given, or that claim to the notice was waived by the party appealing. And again, in the case, *Stamford vs. Whitingham*, (2 *Aikens*, 188,) SKINNER, C. J., said, “it has been repeatedly decided by this Court, if the appeal is taken within the thirty days, (the time limited for giving notice,) a compliance with that requisition of the statute is unnecessary. By taking the appeal within the time the appellant waives the notice.”

In these cases the Court decided, that a town might waive their right to strict notice, by copy of the order, as is provided by statute, and still be bound by the order. The evidence offered by the appellants on this point in their case, and excluded by the court, went no further than to show an express waiver of the notice required to be given by the 5th section of the act of 1817.

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2. This notice being given exclusively for the benefit of the town, taking the appeal, it is most clear, that such town may waive their right to such notice ; and this waiver may be not only expressed, but implied, from the acts of the parties.—*Bradford vs. Corinth*, 1 *Aikens*, 290 ; *Stamford vs. Whitingham*, 2 *id.* 188 ; *Paris vs. Hiram*, 12 *Mass.* 262 ; *Emden vs. Augusta*, *id.* 307. In Connecticut, where, by a provision of their statute, it was necessary for one town, before they could maintain an action against another town for expenses incurred for the support of a pauper, to present a statement of such expenses to such town, and demand payment—but the statute does not declare that such statement shall be in writing—*Hosmer, Ch. J.*, in delivering the opinion of the court in *Newton vs. Danbury*, (3 *Conn.* 553–8,) said, if the law had required the exhibition of notice, and demand to be in writing, my opinion on this point would not be varied : the rule requiring notice is founded in good reason, and was introduced for the defendant's benefit. The defendant as a consequence may always waive the privilege on the established principle, that, *quisquis potest renunciare juri pro se introducto*. The waiver may be expressed or implied ; and as the select men of Danbury, the agents of the town, and vested with full power on this subject, explicitly declared, on the demand made by the plaintiffs, “ that Sally was not the wife of Adam S. Clark, and Danbury was not bound to support her,” they placed their defence on *this ground*, and impliedly waived particular notice. The same doctrine is also held in *Strafford vs. Fairfield*, 3 *Conn.* 588. The principle that a party may waive a right created by law for his exclusive benefit is clearly established as relates to bills of exchange and promissory notes. “ It is a settled rule, that though an endorser has not had regular notice of non-payment by the drawee, yet, if with a knowledge of that fact, he makes a subsequent promise to pay, it is a waiver of the want of due notice.”—*Durgee vs. Denison*, 5 *J. R.* 248. “ The endorser of a note waives the notice to which he is entitled, by promising payment, when notice of non-payment is given him at an earlier hour of the day, than the law requires.”—*Seely vs. Bisbee*, 2 *Vt. Rep.* 105. And the lan-

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language made use of by the Court in the decision of *that* case, may well be applied to *this*, when they say, "this promise under all its circumstances was more than a waiver of further notice. It was calculated to prevent the same ; for the plaintiff might well rest satisfied after this promise from the defendant." So when the service of a writ is irregular, by being served out of, and beyond, the borders of the county, to the sheriff of which it was directed, but defendant on receiving notice of declaration says, "It is all right, I will call and settle the debt and costs," the irregularity is waived.—*Loyd vs. Hankyard*, 17 *Com. Law Rep.* 259 ; *Rawes vs. Knight*, 8 *do.* 270 ; 2 *Chitty's Rep.* 236, 240.

3. An order of removal duly made, and notice given within thirty days, unappealed from by the town to which a pauper shall be ordered to remove before the next county court, is conclusive between said towns as to the settlement of such pauper.—*Stratford vs. Hartland*, 2 *Vt. Rep.* 565 ; *Hartland vs. Williamstown*, 1 *Aikens*, 241 ; 2 *Johns. Rep.* 105. In England an order of removal, unappealed from, has the same effect as the affirmance of the order by the court appealed to. It is conclusive to all persons.—*Ib.* 241-51 ; *Stockham vs. Findon*, 2 *Salk.* 489 ; 6 *T. R.* 615. It has been decided that a notice, which, if answered or particularly objected to, would be insufficient, may become sufficient by an acceptance of it, by the other party.—*Paris vs. Hiram*, 12 *Mass.* 262. The evidence offered by the appellants in this case, and rejected by the court, went to show actual notice of the order of removal from *Morristown*, given to the overseers of the poor of *Barre*, by a written communication from one of the justices making the order to them ; and further, to show, that *Barre* accepted the order of removal, and waived all objections for the want of that notice, by actually taking charge of the paupers, removing them from *Morristown*, and supporting them six years. When *Barre* took under their charge, and removed from *Morristown*, the paupers in this case, and paid the costs which had accrued to that time, *Morristown* had accomplished all they sought to, and giving the notice after the acceptance by *Barre* of the paupers, and their *special request* to have no further proceedings had, would only have made additional cost for *Barre* to pay, without effecting any object contemplated by the statute ; and it is now too late for *Barre* to object for want of *such* notice, after having full notice, and the written forms dispensed with only at their special request. *Lord Coke* says, "the reason of a law is its soul ; change the reason, and the law is changed." And again,

"No one gains an advantage from his own deceit." Let us apply these maxims to the case at bar. The provision of the statute directing a copy to be left, &c., was intended for the benefit of *Barre*, that they might have full knowledge of the proceedings had, and, if dissatisfied, take an appeal. *Barre* having received this knowledge so that they *might* have taken their appeal, and having acquiesced in the justice of such order, and requested that no further proceedings should be had, the *reason* for leaving the copy was obviated, and *Barre*, after having acquiesced in such order for six years, should not now be permitted to take advantage of their own wrong.

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4. The overseers of the poor of a town, are the agents of such town, and their acts and admissions, while executing their agency, will be binding on, and may be proved as evidence against, such town.—*Burlington vs. Calais*, 1 *Vt. Rep.* 385; *Washington vs. Rising, Bray. Rep.* 188.

*The counsel for the plaintiffs, contra.*—1st. The record of the warning was properly excluded. It is defective, the officer's return not showing in what situation the copy was left, which is required to appear by the statute.—*Bray. R.* 183, no. 10; 2 *Aik.* 272. Nor can the officer amend his return.—2 *Aik. R.* 272; 7 *Mass.* 388; 8 *do.* 240; 7 *do.* 242.

2nd. Are the appellees concluded by the order of December 25th, 1823? We answer,—*Firstly*. No legal notice of the order of removal was given. It was not such notice as rendered it necessary, or enabled the appellees, to appeal.—1 *Aik. R.* 290. When a particular form of notice is prescribed by statute, it must be strictly pursued, and a defective notice is not cured or waived by any appearance of the party.—*Cowper*, 26; *Commonwealth vs. Sheldon*, 3 *Mass. R.* 188. So nothing will amount to a notice in writing to make a settlement under the 3 and 4 *W. & M. c.* 11, that is not specified in that act.—2 *Salk.* 475. The town that calls on another town for the removal of a pauper, ought to be able to prove that the notice required by the statute, was actually delivered.—16 *Mass. R.* 110. In the case of *Dutton vs. Hinsdale*, (6 *Mass. R.* 501,) it was held, that notice from one town to another, to obtain the removal of a pauper, or the reimbursement of the expenses of a pauper's support, must be in *writing*, and the town is not concluded if *parol* notice is given to its agent, and he makes no objection on this account. Our statute is imperative, that a copy of the warrant (*Stat.* 370. s. 3) and a

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copy of the order of removal, (*Stat.* 383, s. 5,) shall be left with some one of the overseers of the poor of the town to which the pauper is removed. In *Hartland vs. Williamstown*. (1 *Aik. R.* 241,) it was said by SKINNER, C. J., that previous to the passing of the act of November 4th, 1817, notice in any other way, than by leaving a copy of the warrant, would not be good. The parol evidence there offered to show notice to the appellees of the order of removal, was properly excluded; and without legal notice of this fact, the town is not estopped from questioning the settlement of the paupers. Had the order in question never been executed, nor a copy of it lodged with one of the appellees, which the case shows was not done in this case, it would not be urged that we are concluded by the order, had not the appellees removed the paupers to *Barre*. This brings us to the question, is *Barre* bound by these acts of her overseers? and can overseers of the poor, *virtute officii*, waive the execution of an order of removal, and the notice required to be given by the statute, so as to conclude their town by any thing short of an appeal from the order? Overseers of the poor are special agents, with special powers, which are strictly confined within the acts conferring the power, (*D. Chip. B.* 83, 461, n.) and their acts are no further binding upon the town than as they are done in pursuance of the statute.—1 *Johns. R.* 109; 2 *Cranch* 166. By our statute they are vested with certain special powers, among which is that of appealing from an order of removal made and executed according to the provisions of the statute.—*Stat.* 371, s. 6. But they are nowhere authorized to waive any of the provisions of the statute. Suppose an order of removal was made by one magistrate by the consent of the overseers of the poor of the town sought to be charged by the order, they agreeing to waive the requirement of the statute which requires the order to be made by two magistrates. Would the town be bound by such an agreement? No. But why not; because they exceeded their authority. But have they not as much power to waive this provision of the statute, as the one which requires the order to be executed, and a copy of the warrant and order of removal to be delivered? And will not the power claimed for overseers of the poor, by the appellants, authorize them to submit to arbitrament a question regarding the settlement of a pauper; and thus bind the town? But this power was expressly denied to them in *Griswold vs. North-Stonington*, (5 *Con. R.* 367.) So in *Leavenworth vs. Kingsbury*, (2 *Day's R.* 323,) it was held, that selectmen could not make an accord regarding the



claims of the town. And in *Spencer vs. Overton*, (1 Day's R. 183) it was decided, that they could not make admissions which would bind the town. It is true, that it has frequently been intimated by this Court, that when an appeal is taken from an order of removal within the thirty days, a neglect to leave a copy of the order is not an objection, which can be taken advantage of. But it is to be observed, in all these cases a copy of the warrant was left. And when the appeal is thus taken, the very thing is done, for which a copy is required to be delivered; and the court will presume that a copy was duly left. This was the ground of the opinion of the Court in *Bedford vs. Corinth*, (1 Ark. R. 290.) So in *Burlington vs. Calais*, (1 Vt. R. 385,) it was ruled, that the admissions of an overseer of the poor and agent of a town, that due notice had been received, made while executing his agency, might be proved as evidence against the town. In that case the notice required by the statute had been given, and the agent's admission went merely as to the receipt of it, not that he had waived notice. So it has been held in Massachusetts, that a defective notice may be waived. This however is a defect in form which may be waived by a provision of the statute of that state. But it is believed to be otherwise in matters of substance. But,

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*Secondly.* Admitting that the acts of the overseers of the poor of *Barre* are the acts of the town; yet the appellees are not estopped from questioning the settlement of the paupers. The settlement of the paupers is fixed and determined by the operation of law, and not by the agreement of towns. Therefore, all the requisitions of the statute, which require notice by copy of a warrant and order, must be strictly pursued in order to estop the town to which the removal is made. Thus, when land is set off on execution, our statute, and that of Connecticut, requires the land to be appraised by three freeholders of the town in which the land lies. It would seem reasonable that the creditor and the debtor might waive this requisition of the statute, and agree upon appraisers who resided out of the town. But in *Chapman vs. Griffin*, (1 Root, 196;) and in *Metcalf vs. Gillet*, (5 Con. R. 400,) it was held otherwise, on the ground that the title is transferred by operation of law, and that none of the provisions of the statute can be waived. So an agreement made between two towns that a pauper's settlement is in one of them, does not affect his settlement, and neither town is concluded.—4 Mass. R. 281; 15 do. 261; 3 Salk. 253. We answer

*Thirdly.* That it is true that an order of removal duly executed, and either confirmed or unappealed from, is, according to



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*Stark. Ev.* 1328 ; 2 *Salk.* 488, 524, 527. Stress is laid on the order being duly executed. But in the case at bar, the order was never executed, and it is to be regarded as abandoned by the appellants. They at the request of the appellees desisted from proceeding with their order ; and it seems that both parties treated it as a nullity, as the paupers were removed to *Barre* by the appellees, and not under the order. Had the appellants intended to rely upon the order as determining the settlement of the paupers, they should, and in all probability would, have delivered to the appellees a copy of the order as required by the 5th sec. of the act of November, 1817. In *Leicester vs. Rehoboth*, (4 *Mass. R.* 180,) where it was contended, that the defendant town was estopped from questioning the settlement of a pauper, *Parsons, C. J.*, said, “estoppels are not to be favoured, because the truth may be excluded. And no party ought to be precluded from making a defence according to the truth of his own case, unless in consequence of some positive and unequivocal principle of law.” So in this case, the Court will not hold the appellees estopped, unless they are compelled so to do by some rigid rule of law.

3d. At the trial at the county court, much stress was laid on the circumstance, that the town of *Barre* had, for several years, supported the paupers, and treated them as being their poor. But the appellants ought not to complain of this, for they are benefited, rather than injured, by it ; nor are the appellees affected by it as regards the present question. In *Rex vs. Wooton St. Lawrence*, (*Bur. S. C.* 581,) the parish officers gave a certificate which did not strictly pursue the certificate act of 8 & 9, *W. III*, c. 30, s. 1, to the parish officers of M \* \* \* \*, acknowledging the settlement of the paupers to be in their parish. The paupers afterwards returned to Wooton St Lawrence, where they were relieved until the making the order of removal to M \* \* \* \*. It was objected on appeal from this order, that the removing parish having so long relieved the paupers and submitted to the certificate, that it was concluded from contesting the settlement, and that the parish ought to be bound by the acts of its overseers. But the court held otherwise ; and *Lord Mansfield* added, “it is no consequence, that because parish officers may bind their parish in some things, therefore, they may in all.” In *Rex vs. Chilvers Colton*, (8 *Term R.* 178,) it was held, If it do not distinctly appear on an order of removal, that the justices who made it had jurisdiction, it is a nullity, and the parish to which it is

directed, may at any distance of time object to it, though they never appealed against it, although they have acted under it twenty years.

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WILLIAMS, J., delivered the opinion of the Court.—From the facts which are stated in this case the following questions arise.

1st. Whether the warning to Brigham and his wife, made by the select-men of *Morristown*, a copy of which was offered in evidence, and rejected, prevented the paupers from gaining a settlement in *Morristown*.

2nd. Whether the proceedings of the overseers of the poor of *Barre*, in taking the paupers from *Morristown*, and supporting them in *Barre*, are conclusive evidence of their being settled in *Barre*.

3d. Whether the order made by the justices of the peace of Orleans county, in December, A. D. 1823, in connection with the other proceedings of the overseers of the poor of *Barre*, are conclusive evidence, that the settlement of the paupers was in *Barre*. This last is the most important question in the case, and the only one on which the Court have had any doubts.

On the first question it will be only necessary to remark, that we cannot give to the warning the effect to prevent the paupers from gaining a settlement in *Morristown*, without overturning the numerous decisions which have been made on this subject, and without dispensing with the requisitions of the statute. The return does not state with whom, or where, in the house, the copy was left, and is manifestly bad, either as a return on a writ of summons, or on a warning under the statute then in force.

On the second question it will be sufficient to remark, that the proceedings of the overseers of the poor of *Barre* may be legal evidence, and, as such, may affect the interest of the town; but are not conclusive: they are to be considered in connection with the other evidence, which may be produced. In like manner, relieving the pauper in *Morristown*, or taking him home when notified that he and his family were becoming chargeable, and supporting and maintaining them, for a long time, was evidence, that the pauper was settled in the town relieving. But if this was done under a mistake, as to the facts, or as to the law, and if it can be shown that the settlement of the pauper was not in the town whose overseers have supported him; such proceedings are not, and ought not to be, conclusive upon the question of settlement. It may be further remarked, that it is not stated in this case,

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Since the argument the case has been amended by adding a vote of the town of *Barre*, passed in July, A. D. 1823. This vote does not make any difference in our views of this question. It conferred no additional power on the overseers, was probably passed at their request to sanction any course which they might think proper to take ; but did not by any means enable them to fix the settlement of the paupers in *Barre*, if they had none there before. It might authorize or justify them in pursuing, or in omitting to pursue, certain measures, the effect of which might have fixed the settlement in *Barre*. But the vote itself did not alter the character or nature of their proceedings ; and had no tendency in itself directly to alter or affect the settlement of the paupers.

On the last question, as to the effect of the order made by the justices of the peace of the county of Orleans, adjudging the settlement of Brigham to be in *Barre*, the Court are of opinion, that the order was not conclusive evidence that the settlement was in *Barre*.

An order or removal unappealed from is conclusive evidence of the settlement of a pauper in the town to which the removal is made. So is an order affirmed on appeal ; and such order is not only conclusive between the towns who are parties thereto, but upon all other towns, on the question of settlement. This was decided in a case between *Manchester and Dorset*, 3 *Vt. Rep.* 370. An order of removal reversed on appeal is only conclusive between the parties to the order. To give an order of removal this effect, and to make it conclusive as to all the world, it must be executed ; that is, the pauper must be actually removed, unless prevented by sickness or death ; or the order must be perfected by giving legal notice of the same. When such actual removal is made, the parish to which the removal is made has notice of the proceedings. Under the statute in England the justices do not order the pauper to remove himself, but direct the overseers of the poor of the parish, making the application, to remove the pauper, and, at the same time, to leave a copy of their proceedings with the overseers of the poor of the parish to which the removal is made.

In this state it is required, that an attested copy of every such order shall be left with the overseers of the poor of the town to which the removal is made, within thirty days after making the

order. This is not only for the purpose of giving notice to the town ; but it also determines the term of the court to which an appeal is to be had. The appeal is to be taken to the term of the court holden next after notice of the order is given.

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The leaving this copy is a positive requisition of the statute, and was undoubtedly so required on sufficient and adequate reasons ; and it is not for us to say that it may be dispensed with, or that it is an unnecessary requirement. In the case of *Hartland vs. Williamstown*, 1 *Aiken*, 341, the Chief Justice, in giving the opinion of the Court, remarked, that he presumed “ an order would not be conclusive upon the parish to which the pauper was removed without notice.” This presumption is fortified by the whole current of authorities, and is founded on principles, which ought never to be departed from. In the same case he remarked, that the statute having made provision for giving notice in a particular way, notice in any other way would not be good. These remarks would lead us to think, that the opinion of the Chief Justice, in that case, was, that to make such order conclusive, notice of it must be given in the way pointed out by statute. And we in this case come to the conclusion, on examining the statute, that to make an order of removal conclusive, not only between the towns who are parties thereto, but also, as to all others, it must be perfected by giving the notice required by the statute, that is, by leaving a true and attested copy within thirty days after the order of removal is made.

The arguments which have been urged against the view of the case which we have taken, may deserve some consideration.

It has been said, that the proceedings of the town of *Barre*, and their overseers, and the other proceedings, amount to a waiver of the requisitions of the statute. To this it may be replied, that, if this requisition could be waived, the facts in this case would not amount to such waiver. But further, by no agreement of the parties can a proceeding, wholly imperfect and incomplete, be considered as complete ; by no agreement can a parol contract be treated as a *specialty* ; an opinion of individuals, as a judgement of a court ; a judgement incomplete, and not perfected, as a judgement executed. If the overseers of the poor of *Barre* had received the paupers, without any order of removal, it could not be contended that this agreement was like an order of removal, conclusive upon the question of settlement as to all others. In only one case has it ever been intimated from the bench, that leaving the copy required by the fifth section of the statute of 1817, in

WASHINGTON, relation to the settlement of the poor, could be dispensed with.  
 March, 1832. It has been intimated, that where an appeal was taken from the order before the expiration of the thirty days, the party taking such appeal could not object that such copy was not left. There may be some ground for this suggestion, as the appeal might be taken, and a decision had thereon, before the expiration of the thirty days. Whether this intimation is correct or not, is not material for us to say. It has been decided, however, that where the appeal was taken *after* the expiration of the thirty days, the omission to leave such copy was a defect, with the party appealing might insist on, as an objection to the order ; and the proceedings, on that ground, would be quashed.—*Town of Georgia vs. Town of St. Albans*, 3 *Vt. Rep.* 42.

The proceedings of both these towns were evidently had under a mistaken view of their respective liabilities. It was believed that the paupers were settled in *Barre*, and under this belief the town of *Morristown* neglected to complete their order by leaving the copy required by the statute. The town of *Barre*, under the same belief, consented to receive the paupers without taking any appeal or without any actual removal. And it may as well be considered, as an abandonment of the order, on the part of *Morristown*, as to consider it a waiver on the part of *Barre* of the notice necessary to perfect the order.

If a town intends to prevent a person from gaining a settlement therein, they must pursue the statute made for this purpose in every essential particular, and not omit any of its provisions, relying upon any agreement, as supplying such omission. A town could not neglect to warn out a pauper, relying on an agreement express or implied on the part of another town, and insist that such agreement shall have the same effect as a warning. Nor can they neglect to do every thing required of them by statute to give validity to an order of removal, and insist, that such order shall have all the effect of a valid order.

The town of *Morristown* did not perfect their order of removal made in 1823, by giving the notice required ; and the order, therefore, cannot be received as conclusive evidence that the paupers were settled in *Barre*. The judgement of the county court must, therefore, be affirmed.

*Smith & Peck*, for *Barre*.

*Upham & Keith, & Merrill & Spaulding*, for *Morristown*.

## BANK OF MONTPELIER vs. LUTHER DIXON.

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Where the payees of a promissory note, without the request of the surety, commenced a suit thereon, and attached the property of the principal, and afterwards, by an arrangement made with the principal, dissolved the attachment and discontinued the suit,—it was held in an action brought against the surety on said note that he was not thereby released from his liability thereon.

This was an action of *assumpsit* on a promissory note for \$4000, payable to the *Bank of Montpelier*, in ninety days from date, with the names of Gideon O. Dixon, *Luther Dixon*, Geo. Howe, and Peter Shaw subscribed thereto, in the order here given, as joint and several promissors—dated April, 1826, and discounted at the bank on the 26th day of April, 1826. Plea, *general issue*, and trial by jury.

The note declared on having been read in evidence, it was proved, that the same was presented for discount by Gideon O. Dixon, who had previously notified the plaintiffs that he should have occasion for a considerable sum of money in his business ; and he had received encouragement of being accommodated. He received the money, and it was understood, though not expressly proved, that the other persons, whose names were subscribed to the note, if liable upon the same, were sureties for the said Gideon O. Dixon, as between him and themselves ; and that it was so considered by the plaintiffs. It was also proved, that within the ninety days from the time of discount, the said Gideon paid \$2000, upon said note, which was indorsed thereon ; and, that, according to the usage of the bank, this would have the effect to extend the time of payment for the residue ninety days longer, unless the plaintiffs should think it expedient for their security to enforce payment in the mean time. It was also proved, that about the — day of October, 1826, the plaintiffs, deeming it expedient for their better security, commenced an action upon the note against the said Gideon and all the other persons whose names were subscribed to the same, and caused a drove of cattle, worth about \$2000, to be attached in said suit as the property of said Gideon — That within a day or two after said attachment, upon application of said Gideon, and upon doubts being entertained whether all the cattle attached could be holden, the plaintiffs accepted another note for \$2000, payable to them in twenty days, signed by said Gideon O. Dixon, William Barney, and Ziba Wood, dated October —, 1826, and thereupon dissolved said attachment, and discontinued the action—That immediately after this arrangement the said Gideon caused said cattle to be driven to Boston, where he disposed of them for his own benefit, and soon after ab-

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rescinded, without ever returning to this state. The discount of the note in question, the payment of \$2000, upon the same, as above stated, as also the commencement of said action and the attachment aforesaid, the acceptance of the new note for \$2000, the dissolution of the attachment, and the discontinuing of the action, all took place without any communication relating to the same between the plaintiffs and any of the persons whose names were subscribed to the note in question, except the said Gideon O. Dixon. Thos. Reed, jr. the cashier of said bank, being sworn as a witness, testified, that he, in behalf of the plaintiffs, transacted with Gideon O. Dixon the business of dissolving the attachment, and receiving said new note for \$2000—That at the time the sum of \$2000, and the interest thereon from the expiration of the first ninety days, was due upon the note in question—That the said Gideon upon that occasion gave verbal assurances to the witness, that within the twenty days he would pay the amount of said new note to the agent of the plaintiffs in Boston—That said new note was not accepted nor received in payment, nor part payment, of the note in question, but only as collateral security for the same debt—That no agreement was made nor promise given to delay calling for payment on the note in question, nor again suing the same at any time within the twenty days—and that within the twenty days, to wit, about ten days after receiving the new note, the witness did forward to Boston the note in question, (retaining in his hands said new note,) for the purpose of having the same immediately put in suit there against said Gideon. The witness did not recollect that he reserved the right to enforce payment of the note in question, within the twenty days, by any distinct and express declaration to that effect, addressed to said Gideon; but he testified that it was expressly stipulated that the new note was not to be regarded as payment, but merely as collateral security. He also testified that the new note had been prosecuted to judgement and execution, and that \$400, had been collected thereon, the residue being uncollectable. The defendant insisted that, upon the facts above stated, and the testimony of Reed, his liability upon the note in question, if he was ever liable, had been discharged, and that he was entitled to a verdict; 1st. because the plaintiffs relinquished said attachment without the knowledge or consent of the defendant. 2d. Because they had stipulated to give further time to Gideon O. Dixon, without the knowledge and consent of the defendant. Whereupon the court decided, that by reason of the dissolution of said attachment, in



manner aforesaid, the defendant was discharged, and directed a verdict for the defendant, which was returned accordingly, and judgement rendered thereon. To which direction of the court the plaintiffs excepted, and brought the cause to this Court, and moved for a new trial.

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*Smith and Peck, for the plaintiffs.*—1. Does the dissolving the attachment against Gideon O. Dixon discharge the defendant? The undertaking of the defendant, if he is to be viewed as a surety, is absolute, and not conditional, as is the engagement of an endorser. It was his duty to see that the note was paid. The plaintiffs have their remedy immediately against all or either of the promissors. Mere delay to sue does not in any case prejudice the claim of the creditor, unless accompanied by stipulations, varying the contract, or giving time to the principal, so that he could not sue, if requested by the surety.—5 *Pick.* 307; 2 *Pick.* 581; 10 *East*, 34; 1 *B. & P.* 419; 3 *Yates*, 160; 2 *Johns. Ch. R.* 554; 15 *Johns. Rep.* 433. Nor would it have constituted any defence to this suit, had the sureties, previous to the insolvency and absconding of Gideon O. Dixon, requested the plaintiffs to put the note in suit, and they had neglected to do it, in consequence of which the debt was lost, as against him.—2 *Johns. Ch. R.* 554; 2 *Pick.* 612; 4 *Pick.* 382. And such is the rule of the civil and French law.—*Pothier on oblig.*, *Evans' edition*, 237, art. 6; 3 *Wheaton*, 157, n. a. At all events, it would not operate as a discharge, unless there had been an offer to indemnify the bank against the cost and charges of the suit.—5 *Pick.* 307; 4 *Johns. Ch. R.* 132; *Pothier on oblig.*, 237, art. 5.

The only authorities that militate against this doctrine, are the cases of *Paine vs. Packard*, (13 *Johns. R.*) and *King vs. Baldwin*, in error, (17 *Johns. R.*) But the first mentioned case appears not to have been argued at the bar, and the court grounded their opinion, in a great measure, on the decision of the case, *The People vs. Jansen*, (7 *Johns. Rep.*) the authority of which was in a great measure overruled by the Supreme Court of the United States, in *U. S. vs. Kirkpatrick*, (9 *Wheaton*, 720,) and is denied to be law in this state.—1 *Aik. R.* 296. In the case of *Frye vs. Barker et al.* (4 *Pick.* 382,) before cited, *Parker, Ch. J.*, says, “we have never adopted the law stated to be settled in *Paine vs. Packard*, and it is to be doubted whether that is the law of New-York. There seems to be no reason, in the

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 the debt and then bring an action himself. The case of *King vs. Baldwin* may be relied upon as an authority conflicting with that of *Paine vs. Packard*, as a majority of the judges, and the weight of the legal talent, was in favor of affirming the decree of the chancellor. If the decision in the case of *Paine vs. Packard*, is to be regarded as sound law, then, there can be no necessity, in any case, of going into chancery to compel the creditor to put his demand in suit against the principal; and yet this always has been deemed a subject of equity jurisdiction.—5 *Bro.* 578; 2 *Johns. C. R.* 562.

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The decisions which have taken place in courts of equity in cases of this nature, have always proceeded on the notion, that at law, the thing prayed for could not be done.—5 *B. & A.* 187. If, then, the plaintiffs could have secured the debt against Dixon, and they were requested so to do by the defendant, and neglected to take any measures against him, and thereby the debt is lost, as against him, and yet all this will not discharge the sureties, what foundation is there for the argument, that dissolving the attachment for an honest purpose, releases them, when it was made without their knowledge or request? Would they not be as much injured in the one case as in the other? Does it lie in the mouth of the sureties to object to this act of the plaintiffs? They might, and ought, to have paid the debt, and then secured themselves on the property of Dixon. In *King vs. Baldwin*, Chancellor Kent said, “the cases of discharge are all founded on the fact of a *new agreement* between the debtor and creditor, *varying* the contract, by which the surety originally stood bound.” The reason why the surety in such cases is discharged, is, that it is not the *same* contract which he engaged should be performed, and his risk may be increased by the variation.—3 *Merivale*, 277. And so it is said that extending the time of payment shall release the surety, *because* he has a right, on the day the debt is due, to come into chancery, and insist on its being put in suit; and if the creditor has suspended this right, by a new agreement with the debtor, he has disabled himself to do that equity to the surety which he had a right to demand.—2 *Vesey, jr.* 540; 18 *Vesey*, 20. But dissolving the attachment, in the present case, did not vary the original contract, nor increase the risk of the defendant, nor extend the time of payment. He might for all this have paid the note, and sued Dixon, or, perhaps, have gone into chancery, and compel-

led the plaintiffs to sue.—*Pothier oblig.* 323, *art.* 6. Upon what principle, can it be held, that the defendant is discharged? He did not become surety on the faith of this attachment, nor even request it to be made; and the whole case shows that the plaintiffs acted in perfect good faith, and in a manner they believed for their interest, and that of the sureties. It was not known what part of the cattle Dixon owned, and it was, therefore, thought to be for the interest of all concerned, to release the cattle and take the note, which was then supposed to be good. It is true, that where the surety pays the debt, he may come into chancery and compel the creditor to transfer to him every security which he took, at the time the debt was contracted, and possibly those that were subsequently obtained, if they remained in his hands, although the doctrines laid down by *Pothier*, (*no.* 496, 519, 520,) cited by the Chancellor, in *Hays vs. Ward*, (4 *Johns. Ch. R.* 130,) do not go as far as this, and it is believed no case can be found which does. The general principle, that a surety has a right to have assigned to him the securities taken by the creditor, is laid down in the last mentioned case; but the Chancellor does not intimate that the case, then under discussion, fell within that principle, though for special reasons an injunction was granted; and it appears the case was never moved again. That case, too, may be distinguished from this, for *Hays* was an accommodation endorser for the maker, and this known to *Ward*, and his undertaking was only conditional, that he would pay, if the maker did not, as is the undertaking of every indorser.—*Law vs. E. I. Co.*, 4 *Vesey* 829; *Commonwealth vs. Vanderslice et al.* 8 *Serg. & Rawle*, 452. This is no doubt so in equity, however it may be at law; but it does not impugn the right of the plaintiffs to recover, even in equity, for no money has passed into their hands. The case of *Rathbone et al. vs. Warren*, (10 *Johns. R.* 587,) was, where the creditor had given the principal a written agreement not to take out execution for a given time: this, it was rightly held, discharged the surety. The case of *Jones vs. Bullock*, (2 *Bibb*, 467,) and *Baird vs. Rice*, (1 *Call*, 18,) are cited in note to *Starkie's Ev.* 1390, as deciding, that where property of the principal was taken on a *fieri facias*, and afterwards restored to him, without the privity of the surety, he was discharged. In these cases the property must have been levied upon, at the request, and for the security, of the surety. But were it otherwise, these reports are not good authority, and have never been regarded as such by this Court. The weight of authority,

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WASHINGTON as well as reason, is against these decisions. Thus, when the holder of an indorsed note had recovered judgement against the maker and indorser, and the latter requested him to take out execution and levy upon the property of the maker, which he neglected to do, the Court held, that the endorser was not discharged, although it appeared, that he countermanded the execution, after it was in the hands of the officer, and that the debt might have been collected of the maker, had it been proceeded in.—3 *Wheaton*, 520. So the surety is not discharged by the creditors giving time to the principal debtor, or even by his discontinuing a suit commenced against the principal, without the privity and consent of the surety, unless the surety has explicitly required him to proceed against the principal.—15 *Johns. R.* 433 ; *Pothier on oblig.* 233. So where the payee of a note sued the maker, and attached personal property, and after wards sold the note against the consent of the surety, whereby the property was released,—it was held, that the surety was not discharged, though the principal afterwards became insolvent, and the debt against him was lost.—5 *Pick.* 370. The case of *Halford vs. Brown*, (*Pre. in Chan.* 178, cited in *Fell. on Guar.* 216,) is nearly parallel in every particular with the present one.

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If the defendant has any relief, it is in equity, not law.—5 *B. & A.* 187 ; 1 *Holt's cas.* 399, n.

2. The payment of \$2000, at the expiration of the ninety days, on the understanding, that according to the usage of the bank, this would have the effect of extending the time of payment for the residue, ninety days longer, cannot discharge the defendant ; because, 1. It is to be presumed that the defendant signed the note, knowing such was the custom of the bank ; and 2. The plaintiffs, by this usage, reserved the right of suing when they deemed it for their security ; and no agreement between the payee and principal will discharge the surety, unless it is founded on a sufficient consideration, and binding in law upon the parties.—12 *Wheaton*, 554.

3. The question whether taking the note payable in twenty days, was giving time for the payment of the balance due on the original note, is purely a question of law, and calls for a decision of this Court. The case shows that the note was taken merely as collateral security ; that it was not a substitution of one note for the other. The case of *Gould et al. vs. Robson et al.* (8 *East*, 576,) is clearly distinguishable from this. There, the plaintiffs, being endorsees of a bill of exchange, when the bill

fell due, received part payment from the acceptor, and agreed to draw a bill on him for the remainder, payable at a future day, which he accepted; and that until the last mentioned bill was paid, the plaintiffs should keep the original bill in their hands as security. Here the plaintiffs could not sue till the bill became due, as they had expressly agreed to keep the original bill in their hands till that time. Besides, the new bill was substituted for the old, which was to be retained only as security. This, it must be observed, too, was a case between an endorser and endorsee. It is a principle as well settled as any other in the law, that the mere change, or addition of securities, not displacing the original debt, nor suspending for a time the creditor's right of action, will not discharge the surety.—18 *Vesey*, 20; 3 *Com. L. R.* 143, n. 35. Thus, where the obligee took additional and collateral security from the principal, and even prolonged the time of payment for the additional security, it was held that the surety was not discharged.—1 *Desauss.* 315, cited in note 1 to *Stark. Ev.* 1390. The indulgence granted to a principal which will discharge the surety, must be of that kind, by which the nature of the contract is changed, or whereby the creditor, without the consent of the surety, deprives himself of the power of suing by something obligatory, which prevents the surety from coming into a court of equity for relief.—3 *Com. L. R.* 35; 1 *Aik. Rep.* 296; 4 *Harris & McHenry*, 41; 3 *Stark. Ev.* 1390, n. 1.

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*Merrill and Upham, for the defendants.*—As between the creditor and the surety the principle appears to be well settled, that the creditor can do no act with the principal alone, which shall injure or impair the rights of the surety, without discharging him from his responsibilities. Sureties are the favourites of courts of justice, and, as *Chancellor Kent* said, in *Ludlow vs. Simonds*, (2 *Caine's Cas. in Error*, 1,) “It is a well settled rule, both at law and in equity, that a surety is not to be holden beyond the precise terms of his contract; and a court of equity will never lend its aid to fix a surety beyond what he is fairly bound to at law.”—It is not contended by the defendant that *mere delay* on the part of a creditor would discharge a surety; but the defendant does insist, that if the creditor undertakes to act, he must act in good faith towards the surety, and must not by relinquishing any security obtained by such act, impair the rights or increase the risk of the surety. The principle laid down by Lord *Loughborough*, in *Rees vs. Berrington*, (2 *Ves., jr.* 543,) was, that

WASHINGTON, there could be no transaction with the principal debtor without acquainting the surety who has a great interest in it. The surety only engages to make good the deficiency, and it is the clearest and most evident equity, not to carry on any transaction without the privity of him, who must necessarily have a concern in every transaction with the principal debtor. "You cannot," said the Chancellor, "keep him bound, and transact his affairs, without consulting him." He must be the judge whether indulgence shall be given to the principal or not.—*Vide Rathbone vs. Warren*, 10 John. R. 587 ; *Fell on Guaranty*, 198. In *English vs. Darby*, (2 Bos. & Pul. 61,) where the endorsee of a bill, having the right to sue all the parties, sued the acceptor to judgement, and took out execution, on which he received part payment, and a bond and warrant of attorney as a security for the remainder, with a view to enable him to support actions against the other parties to the bill, Lord Eldon said, "The plaintiff, having taken a new security from the acceptor, has discharged the other parties to the bill."—Upon the same principle, the defendant in this case would be discharged; for the plaintiffs having sued the principal, and attached sufficient of his property to secure their debt, released such attachment, and took a new security for the debt. In *Paine vs. Packard*, (13 John. R. 174,) the Supreme Court of New-York went so far as to say, that the payee of a note, by neglecting to prosecute the note after request by the surety so to do, until the principal becomes insolvent, thereby discharges the surety. But in *King vs. Baldwin*, (2 J. Ch. R. 554–61,) Chancellor Kent denied that case to be law, but admitted that a surety might resort to chancery on the day after the debt is due, and insist on its being put in suit ; and if the creditor then refused to prosecute, the surety would be discharged. In this manner, according to the doctrine of the Chancellor, the surety, by paying the trifling expense of a bill in chancery, might obtain the same relief that he would be entitled to on a simple request, according to the decision of the Supreme Court. But this decision of the Chancellor, on appeal, was overruled in the court of errors by a small majority, and the doctrine of *Paine vs. Packard* supported. In referring to that case, *Spencer, C. J.* says, the principle adopted there was this, that when the creditor did an act injurious to the surety, the surety would be discharged. And again he says, the case of *Rathbone vs. Warren*, decided in that court with entire unanimity, establishes the principle, that if the creditor does any act in-

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pairing the rights of a surety, without consulting the surety, the latter will be discharged.—17 *Johns. R.* 384. WASHINGTON  
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The following are a few among the many cases which support the doctrine, that the creditor can do no act to invalidate or discharge the security he has taken of the principal debtor, to the prejudice of the rights of the surety, without discharging him :—*Hayes vs. Ward*, 4 *Johns. Ch. Rep.* 130 ; (2 *Sto. Dig.* 151 ; 1 *Mad.* 196 ;) *Jones vs. Bullock*, 2 *Bibb*, 467 ; (3 *Stark. Ev.* 1390, n. ;) *Rathbone vs. Warren*, 10 *Johns. Rep.* 587 ; *Baird vs. Rice*, 1 *Call*, 18 ; *Law vs. East India Co.*, 4 *Ves. jr.* 824 ; *Commonwealth vs. Vanderslice*, 8 *Serg. & Rawle*, 452 ; *Nisbit vs. Smith*, 2 *Bro. C. C.* 579 ; *Baker vs. Briggs*, 8 *Pick.* 122. Montpelier b'k.  
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Let us apply the principles established by these authorities to the case at bar. Had the plaintiffs at the time of discounting the note in question, or at a subsequent period, taken of Gideon O. Dixon, without the knowledge of the sureties, the cattle mentioned, as additional security, there could have been no doubt but that the sureties would have been discharged, if the plaintiffs had afterwards returned said cattle to him without their consent. The same would have been the case, had the plaintiffs taken a mortgage of the principal, as additional security, and had afterwards discharged it without the consent of the sureties, for the very obvious reason, that the risk of the sureties would have been thereby increased. And for the same reason, the defendant insists, the releasing of the attachment in this case discharged him ; for it is most evident from the facts appearing upon the bill of exceptions, that if the plaintiffs had not released the attachment, the sureties would never have been called upon ; and it is now too late for the plaintiffs to contend, that that release did not work an injury to the sureties. By that means the principal debtor was enabled to escape with his property beyond the jurisdiction of the courts of this state, and thus defeat any effort of the sureties to secure themselves, and on principles of good faith and common honesty, must be deemed to have exonerated the sureties. If the defendant had no interest in the attachment, so that by releasing it he was discharged, surely he could have no interest in the new note taken by the plaintiffs for the *same* property ; and they might have discharged it without any consideration, or they might have received the amount and appropriated it to the payment of any other debt : but such a proposition would have been too absurd to have claimed a moment's consideration. The very admission of



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 March, this last note, as a part payment of the note in suit, is an admission  
 1832. that the defendants had an interest in that note, and the direct in-  
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 vs. terest in the cattle, for the discharge of which the note was taken.  
 Dixon. From the facts presented by this case, we may draw a safe con-  
 clusion of the value which the plaintiffs put upon this attachment.  
 The plaintiffs in October, 1826, becoming suspicious of the sol-  
 vency of Gideon O. Dixon, the principal debtor, undertook to se-  
 cure themselves, and accordingly sued out an attachment against  
 all the signers of the note, but had it served *only* on Gideon O.  
 Dixon, by attaching property of his to the value of \$2000 or  
 more. From these facts we apprehend the Court will be satisfied  
 that the plaintiffs considered their debt as perfectly secured by such  
 attachment. If such was the fact, any release of that security af-  
 terwards, without the consent of the sureties, would discharge  
 them. On receiving information of this attachment, the defen-  
 dant might well have rested satisfied, if he had before felt him-  
 self insecure. To have then paid the note and seized the cattle,  
 would not have made the debt any more secure against the princi-  
 pal. And he could not have filed a bill in chancery to compel the  
 plaintiffs to proceed in the collection of their debt against the prin-  
 cipal ; for they had already commenced it ; and after having de-  
 prived the defendant of this right, can the plaintiffs be permitted  
 in a court of justice to aver, that discharging that attachment and  
 releasing the property, was no injury to the defendant ?

If the facts shown are sufficient to discharge the defendant from  
 his liability in a court of chancery, he is equally entitled to relief  
 from this Court ; for as *Thompson, J.*, said, in delivering the opin-  
 ion of the court in the *People vs. Janson*, (7 J. R. 332,) “ what-  
 ever would exonerate the surety in one court, ought also in the  
 other.” *The facts being ascertained, the rule of law must be the*  
*same in this Court as in a court of chancery.*—*Vide* 10 J. R.  
 587 ; 13 *ib.* 174 ; 2 *Sw. Dig.* 152. When a guaranty is not  
 under seal, there is no technical rule which restrains a court of  
 law from doing justice ; still less is there any which constrains the  
 court to compel payment by a surety, who in justice and equity  
 has been discharged by the conduct of the creditor.—3 *Stark. Ev.*  
 1390. We are aware that in *Fulton vs. Mathews*, (15 *Johns.*  
*Rep.* 433,) it appears from the note of the case, that “ a surety is  
 not discharged by the plaintiff’s giving time to the principal debt-  
 or, or even by his discharging a suit commenced against the prin-

cipal, without the privity or consent of the surety. But from the facts in that case, it appears, that at the time the suit was discharged, the principal was insolvent ; and *Spencer, Ch. J.*, very justly remarks in deciding that case, that to amount to a discharge, "it ought to be put beyond a doubt, that the surety is injured by the delay ; that is, that the principal was solvent and able to pay the debt at the time the suit was discharged." This we apprehend amounts to the same as saying, that if the principal was solvent at the time, and afterwards became insolvent, it would amount to a discharge ; and that is the doctrine contended for in the present case. The case of *King vs. Baldwin*, so much relied upon by the plaintiffs for the able opinion given by the Chancellor, is not opposed to the case at bar. The question decided there was, that *mere delay* to sue the principal, after a request by the surety, would not discharge him. In that case the *promisee* was merely passive ; and the Chancellor says, "there is no *proof* or *pretext* that Baldwin, by any agreement with Fowler, enlarged the time of payment, or *impaired* the rights of the plaintiff in his relation as surety. Had the plaintiff, in the case at bar, remained *passive*, the defendant might have had no reason to complain, but after having awakened public attention to the failing circumstances of the principal by attaching property sufficient to satisfy their debt, they, by a *new agreement* with the principal, released such property and discharged their attachment, when they were bound by every principle of equity and justice to retain such property for the satisfaction of their debt. A creditor, who has his debt secured by a surety, and has also, or takes afterwards, property from the principal debtor, as a security or pledge for his debt, is bound to keep the property for the benefit of the surety as well as himself ; and if he surrenders the property without the knowledge and consent of the surety, he loses his claim against the surety to the amount of the property given up. This principle was fully established by the supreme court of Massachusetts in *Baker vs. Briggs*, (8 *Pick.* 122,) and in delivering the opinion of the court, *Parker, Ch. J.*, further said, "If the plaintiff had in his possession personal property of the principal, which he held as security for this note, and suffered it to pass back into his hands, without the knowledge or consent of the surety, the latter would thereby be discharged of his liability ; for such conduct would be a fraud upon a surety. It is said that a creditor may exercise his discretion and surrender one species of security for another, or, if he has an excess of security, he may give up a part. Undoubtedly he may,

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WASHINGTON, but it is at his own risk. If the part he retains fails, the loss ought  
 March, to be his own. Fair dealing requires that he should consult the  
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WILLIAMS, J.—The only question presented in this case is, whether the dissolution of the attachment made by the plaintiffs on the property of Gideon O. Dixon was a discharge of the other signers to the note on which this suit is brought? The county court so decided; and if their decision is correct, the plaintiffs have no further claim on the defendant. If it was not, there must be a new trial, as there are no other facts established which will entitle the defendant to retain the verdict. This presents the inquiry as to the rights and duties of a plaintiff or creditor, in a case similar to the present. The first and most natural view of the case would be, that as the plaintiffs parted with their money on the credit of all and each of the signers of the note, they might look to each for satisfaction, and would not lose their claim against any, until they were fully repaid the amount advanced, and that they ought not to be compelled to recognise the defendants, in the relation of principal and surety; but might in any of their negotiations treat all the signers as principals. We are inclined, however, to waive the consideration of this question at this time on account of the sickness of one of our brethren, and the absence of another, as we are all agreed on another point, that there must be a new trial.

Considering Gideon O. Dixon as the principal to the note on which the suit is brought, and the defendant and other signers as sureties, we are to enquire whether the surety has been discharged from his liability. Certain principles borrowed from the civil law, and from the courts of equity, have been adopted by the courts of common law, as to the duties of the creditor towards the surety, and as to those acts of the creditor, and transactions between him and the principal which will discharge the surety. These principles we should endeavour to draw from the points decided in the cases. The opinions expressed by judges or chancellors in deciding a case, and expressions falling from them in elucidating their views, are frequently cited by elementary writers as the law which was established in those cases, or the principle to be drawn therefrom; and many of these expressions and opinions have been cited in this argument. I apprehend, however, that it is easier to reconcile the *several decisions* which have been made, than it is to establish a system founded on those opinions and expressions. Most of the authorities which have been read

in this case, were read and examined in the case of *Hubbard vs. Davis*, 1 *Aikens*, 296 ; and some of them, at least, were over-ruled. The case of *Rees vs. Berrington*, 2 *Vesey, jr.* 540, and the cases cited in the marginal notes to that case, and the case of *English vs. Darling*, 2 *Boss. & Pull.* 61, certainly establish this principle ; That, when the creditor, without consent of the surety, gives time to the principal by a contract which, in the language of *Gibbs, C. J.*, in *Orms vs. Young, Holt*, 84, ties up his hands, the surety is discharged, and this for two reasons. 1st. It is varying the terms of the contract, by extending the time for its fulfilment ; and no surety is ever charged beyond the terms of his contract. A surety might be willing to be holden for a limited time, but unwilling to be holden for a longer period. 2d. Because the surety may in a court of equity compel the creditor to sue the principal debtor at law, under such regulations as the court shall make, so as not to impair his security or delay his debt, which the creditor cannot do, if he makes a contract with the principal for delay. We think it is equally well established, that a delay or neglect of the creditor to sue the principal, though urgently requested thereto by the surety, is not a discharge of the surety. The surety may pay the debt, and pursue the principal for his own benefit. Further, the surety, on paying the debt of the principal, is entitled to be put in the place of the creditor, and may avail himself of all, or any, of the collateral securities, means, or remedies, which the creditor has for enforcing payment against the principal, and may have them assigned to him, under such terms as a court of chancery may order. And further, as to any other collateral securities, which the creditor may have at the time the surety entered into the obligation, and which may have had an influence in inducing the surety to become obligated, the creditor must act with good faith, and not discharge them to the prejudice of the surety.

But inasmuch as the creditor is not compelled to institute a suit at the request of the surety, so he may discontinue any suit by him instituted for his own benefit, and without any such request, if he acts with good faith, and with a view to his own interest. And, although it is commenced by attachment, with a view of enforcing a more speedy payment, yet, if it was commenced without the request or knowledge of the surety, so it may be discontinued, or other security may be received, as a substitute for the attachment, without consulting the surety, if the creditor acts with good faith. The cases of *Fulton vs. Mathews and Wedge*, 15 *Johns.* 433,

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WASHINGTON and *Bellows vs. Lovel*, 5 *Pickering*, 307, countenance this opinion.  
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We have had no opportunity of seeing the cases decided in Kentucky, *Jones vs. Bullock*, 2 *Bibb*, 467, and *Baird vs. Rice*, 1 *Call*; 18, nor the case in Pennsylvania, *Commonwealth vs. Vanderslice and others*, 8 *Serg. & Rawle*, 452, except what we find in the note to *Starkie's Evidence*, 3 *Vol.* 1390; and it would be unsafe to rely on them, unless we could learn, from the reports themselves, under what circumstances the cases appeared to the court, and what was the point decided. In the case of *Niebit vs. Smith*, 2 *Brown*, 579, the creditor had commenced a suit at the urgent request of the surety, and then had compromised the suit, and given a time to the principal of three years beyond the originally stipulated time; and under these circumstances the surety was released.

In the case of *Law vs. East India Company*, 4 *Vesey, jr.* 824, nothing was determined; but the question, as to the liability of the surety, was left to be settled in a suit directed to be brought thereafter. We find nothing there, nor in any of the cases which have been read, which militates against the opinion we have formed in this case. We are all of opinion that the dissolving the attachment made by the plaintiffs on the property of Dixon, was no discharge of the sureties of Dixon. The attachment was commenced for their own benefit, and not at the request of the defendant and the other signers. If that suit had been pursued, they might have attached the personal property of either of the other signers, and collected their debt of them; and would not have been compelled in chancery to pursue the attachment against G. O. Dixon, unless at the request of the defendants, and on being fully indemnified for any costs or liabilities, if there were any doubt as to the ownership of the property, and in such a manner that they should not be delayed in the collection of their debt. It was discontinued in good faith, and under such circumstances as might reasonably have been expected at the time would have ensured a more speedy payment from G. O. Dixon, and thus have relieved the sureties altogether. It was not transacting the business of the surety, as has been said in the argument; but was managing their own business, for their own benefit, not at the request of the surety. It was commencing and discontinuing a suit in a manner which the plaintiffs might reasonably suppose would coerce the payment of the debt by G. O. Dixon. If the defendant or the other signers were dissatisfied, they might have paid the note, and

sued G. O. Dixon, and attached the same property, or have requested and received of the plaintiffs the benefits of that attachment on giving them such indemnity, as might have been equitable.

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In considering this question in this view, it cannot have escaped the attention, how very embarrassing it is to compel the holder of a joint and several note, more particularly a bank, to recognise the relation of principal and surety in the signers of the note; and there are some authorities which tend to establish the principle, that they are not. But the case does not require of us to consider this question; and for the reasons already suggested it is left open for a decision when a case is presented which requires it.

The judgement of the county court is reversed and a

New trial granted.



ROSWELL WATERS vs. GEORGE M. DAINES.

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The collector of a school-district tax is liable in trespass for seizing property by virtue of his warrant and rate-bill, if the district have no power to grant the tax, or if there be any illegality in voting it.

And although in such case the rate-bill and warrant are regular on their face, the collector is not justified.

The inhabitants of a school district cannot vote a tax on a list which is not to be completed until after thirty days from voting the tax; and

Therefore, where a school district voted a tax in May on a list which could not be completed till December following, and, consequently, the tax could not be assessed within thirty days after voting the tax, as required by the statute, it was held to be illegal, and that all the subsequent proceedings had to enforce the collection of the tax were also illegal.

A school-tax is not necessarily void because it is not assessed within thirty days after it is voted.

This was an action of *trespass* for seizing and carrying away certain sheep, the property of the plaintiff. The defendant pleaded the *general issue*, and gave notice, that he should give in evidence under it, that he took the property in question as collector of a school district, in which the defendant was assessed, by virtue of a rate bill and warrant; and on trial offered in evidence the said rate bill and warrant, and a copy of the record of the proceedings of said school district relating to the voting and assessment of the tax; from which it appeared that the tax was voted on the 15th day of May, 1830, and was to be levied on the list for that year; and that it was not assessed within thirty days after it was voted. For these reasons the counsel for the plaintiff objected

WASHINGTON, to the evidence, and the court accordingly rejected it, and directed a verdict for the plaintiff. The defendant excepted, and the case was reserved for the opinion of this Court.

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After argument by *Smith & Peck*, for the defendant, and by *Merrill & Spalding*, for the plaintiff,

**WILLIAMS, J.**, *delivered the opinion of the Court.*—The defendant justifies the taking of the property, for which this action of trespass is brought, by a warrant and rate bill for a school tax.

No objection has been made to the warrant and rate bill on account of any irregularity apparent on the face; but it is urged that the tax was illegal. The position, that a collector of taxes is accountable in an action of trespass when there is a want of power in the town or district granting the tax, or where there is any illegality in voting the same, has been considered as too well settled to be questioned at this time. Hence the legislature, while they have exempted the collector from any liability on account of any mistake, mischarge, or overcharge, in the rate bill, give him a right of action directly against the town or community granting, or attempting to grant, a tax, where he is made accountable on account of such want of power to grant, or illegality in granting.

The reason of this is obvious. Unless such action could be maintained, the person injured would be either without any remedy, or any but one wholly inadequate. No action can be maintained against the corporation except to recover back the money which they have wrongfully received, and this, it will be seen, would go but little way in compensating a person whose property has been sacrificed by a public sale, or whose body has been imprisoned to compel the payment of a sum of money illegally demanded of him. Every one who is injured in this way should be permitted to have recourse immediately to the person who takes his property, or imprisons him against his will, to recover such damages as he has sustained leaving that person, if he fails to make out a justification on account of the illegality of those who set him to work, to obtain his recompence of the community of which he is a member, and as whose officer, and by whose direction, he committed the injury complained of. This was recognised as the law upon these subjects, in the cases of *Harrison vs. Babcock et al.* 1 H. Black. 68; *Williams vs. Pritchard*, 4 Term Rep. 2; *Eddington vs. Borman*, 4 do. 4; *Perchard vs. Heyward*, 8 Term, 468. This principle was fully and ably illustrated by C. J. CHIPMAN, in the case of *Wilcox vs. Sherwin*, 1 D. Chip. 72. The opinion



of the chief justice, it is true, was not sustained by the associate justices, who held the rate bill and warrant to be a sufficient justification to the officer. And there are some decisions in the neighbouring states to the same effect. Yet his opinion was adopted by this Court in the case of *Bates vs. Hazeltine*, 1 *Vt. Rep.* 81, where it was decided, that the collector of a district school tax must not only show his rate bill and warrant, but also the organization of the district, the appointment of the committee, and the vote laying the tax; and the Court remark, that if the tax was not legally imposed, the collector had no right to collect it. This authority is decisive upon this part of the case, viz. that the collector is liable if the tax is illegal.

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The next question is, whether the tax was legal. It seems it was voted on the 15th May, 1830, on the list of 1830. By the general law in relation to lists and listers, the lists are to be given in in the month of April. After they are given in, the listers are to add assessments by the twentieth of June, and also the appraisal of the real estate in those years when such appraisal must be made; and to add two folds in the month of September; and the whole list is not to be completed until 10th December.

Taxes are required to be apportioned on the list of the polls and ratable estate; and it seems to me, it would be proper that all the taxes voted as granted in any one year, should be laid on one list, and that one completed or perfected.

It is very clear, that a vote to raise a tax on a list to be given in at any distance of time would not be legal, as on a list to be made up, one, two or ten years thereafter. It is true the decision in the case of *Mountville vs. Houghton*, 7 *Con.* 543, recognises that a tax voted in November, 1823, on a list which was not, and could not be, completed until August, 1824, was legal; but it seems to be founded on the usage or practice, which had prevailed in that state, confirmed by a statute passed in 1826. Possibly there might be cases, in which it would be better to lay the tax on the list which is making. But leaving this question, as to the right of towns to vote a tax on the list perfected, or on the list which is making between the 1st April and 10th December, it cannot be doubted on what list a school tax must be voted. The statute of 1827, for support of schools, 7th section, prescribes who shall be considered as lawful voters in a school district.

Any man who is twenty-one years old, and is liable to pay taxes in said district, and is a resident of the district at the time, shall be considered a lawful voter. By the 11th section, the committee

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are required to assess any tax voted by the district on the polls and ratable estate of the inhabitants, who are defined to be the inhabitants living in the district, within thirty days after the vote raising the tax. And although this may be, and is considered, as directory merely, so far, that if the committee neglect to make the assessment within thirty days, and do make it after that time, yet the tax on that account would not be illegal, but might be collected. It is nevertheless decisive as to what list it must be assessed on; that is, the tax must be voted on a list completed, so that the committee could exercise the power devolving on them, within the period prescribed by the statute, and voted by persons whose liability to pay the tax is ascertained by a list already made out. We are, therefore, all agreed in saying, that a school district cannot vote a tax on a list which is not to be completed until after thirty days from voting the tax; and we apprehend the decision in the case from Connecticut is not at all at variance with the principle which we here adopt; for *Judge Daggett* says, in that case, if the tax was laid in 1823, on the list of 1823, and the rate bill was to be made out immediately, there would be force in the argument against it, as the tax could not be completed until several months after.

Inasmuch as in this case the tax was voted in May, on the list of 1830, which could not be completed until the December following, and could not be assessed within thirty days, as required by the statute, it was illegal, and rendered all the subsequent proceedings, had to enforce the collection thereof, illegal also.

It has, however, been argued, that the rate bill and warrant, being regular on their face, and the district having jurisdiction of the subject matter, the defendant is protected;—that the district had the power of raising the very tax that was voted; and if it ought to have been on another list, it was no more than the improper exercise of a legal and given power. This argument however is built on a false basis. It assumes as its foundation the very fact which the defendant is endeavouring to establish. The district had no power to vote this very tax. They had the power of raising a tax on the list then made; but they had no power to lay the tax on any other apportionment; and these proceedings were as manifest a departure from the authority given in the statute, as they would have been, had the tax been voted on the list of the polls only, on the list of the real estate alone, or on any one of the species of personal property which are to be given into the list. If from this argument it could be deduced that the irregu-

larity here complained of was a mere mistake, mischarge or overcharge, in assessing or making up the rate bill, it would avail the defendant; but the objection in this case goes beyond the proceedings of the committee, and is directed against the proceedings of the district itself, of which both the plaintiff and defendant are members. The collector cannot be compared to an officer acting under the proceedings of a court of competent jurisdiction, where the proceedings are held to be regular, both with respect to him and the party, until set aside, as we consider there was clearly a want of power in the district to lay this tax on the list on which it was voted. And whether it is considered a case where there was a want of authority to lay the tax, or an illegality in laying it; in either case, it would afford no justification to the officer who attempted to collect the same.

The judgement of the county court must, therefore, be affirmed.

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March,  
1832.

Waters  
vs.  
Daines.

ISAAC S. BEACH vs. MOSES S. ABBOTT & ABDIEL BLODGET.

ESSEX,  
March,  
1832.

An officer by the directions of the creditor's attorney attached certain personal property of a debtor by virtue of a writ of attachment, and delivered the same to a person, who executed his receipt therefor to the officer, promising to redeliver it on demand, and then permitted it to go back into the possession of the debtor. Afterwards the attorney took out a writ of attachment in his own favor, against said debtor, and gave it to the same officer, with directions to attach the same property; which was done accordingly. Judgement having been rendered in this last suit, the property was sold on the execution issuing thereon.—It was held in an action brought by the officer on the receipt, taken on the first attachment, to recover the value of the property, that the suit could not be sustained.

This was an action of *assumpsit* upon a promise of the defendants to redeliver to the plaintiff certain goods and chattels on demand. A verdict was returned in favor of the defendants, subject to the opinion of this Court on the following case.

The property in question belonged to one *Josiah Abbott*, and was attached while in his possession, on the 9th day of April, 1829, by the plaintiff, who was a deputy sheriff, on a writ of attachment in favor of one *Heath* against *Abbott*; the property being exposed, and turned out for attachment, to the plaintiff, by *James Steele, Esq.*, attorney of *Heath*. Whereupon the defendants executed to the plaintiff a receipt for said property, promising to redeliver the same on demand. The property was not removed from the possession of *Josiah Abbott*. Afterwards, on the 21st day of May, 1829, *Steele*, finding the property still in the possession of *Josiah Abbott*, directed the plaintiff to attach it on a writ of at-

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tachment in favor of Steele against Josiah Abbott : and the plaintiff accordingly, in his capacity of deputy sheriff, attached and took away the property, and afterwards sold it on an execution issued in favor of Steel in the suit last mentioned. The writ in favor of Heath against Josiah Abbott being returned and entered in the county court, to which it was made returnable, Heath recovered judgement thereon against said Abbott for a sum much larger than the estimated value of the property. Heath having prayed out execution upon his judgement, delivered it for collection to the plaintiff, (who still continued deputy sheriff,) within thirty days after the rendition of said judgement, but long after the second attachment of the property and the sale thereof on execution. The plaintiff within the life of the execution in favor of Heath, demanded the property of the defendant, *Blodget*, and was prevented from making demand upon the defendant, *Abbott*, by reason of his residing in Canada. It was agreed that if upon the facts aforesaid, the plaintiff was entitled to recover in this action, the verdict was to be set aside, and judgement to be rendered for the plaintiff for the value, as estimated in the receipt, of so much of said property as was not admitted in any count in the declaration to have been redelivered ; otherwise the verdict to stand.

On this statement of facts the county court decided that plaintiff was not entitled to recover, and rendered judgement on said verdict. The plaintiff excepted, and removed the cause to this court for a final decision.

After argument by *Cushman & Paddock*, for the plaintiff, and *Wells & W. Mattocks*, for the defendant,

WILLIAMS, J., delivered the opinion of the Court.—This is an action brought by the plaintiff, to recover of the defendants on their contract to deliver to him on demand certain articles of personal property, which they had received of him. It appears that the plaintiff, as deputy sheriff, had attached the property in question, at the suit of one Heath against Josiah Abbott ; that the property was turned out to him by Mr. Steele, the attorney of Heath, and was delivered to the defendants, who executed the receipt on which this action was brought, and permitted the same to go back into the possession of *Abbott*. Afterwards Mr. Steele took out a writ of attachment in his own favor against *Abbott*, gave the same to the plaintiff to serve, who by direction of Mr. Steele attached the same property. On the last writ a judgement was recovered by Mr. Steele, an execution issued thereon, and the plaintiff, as

deputy sheriff, sold the property attached to satisfy the same. The question is, whether these defendants are liable on their contract, to deliver this property to the plaintiff, when the plaintiff has already taken the same into his own possession, and disposed of it as before mentioned.

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Considering this as an ordinary case between a bailor and his bailee, it would be too plain to admit of a controversy. If one person delivers property to another to keep, takes a contract for the redelivery, and afterwards retakes the property into his own possession, the contract must be at an end; and it would be preposterous to think of maintaining an action on the contract for the same property.

The case under consideration is one of that character. The plaintiff by the attachment had the possession, and the right to the possession, of the property attached; the defendants, the receipts men, took the property to keep for him. He had a right to retake the same at any time against their consent, and when he did take it, their contract to redeliver it to him was fulfilled and at an end.

There is nothing in the character in which these parties acquired what right they had to this property, which takes this case out of the general principle before mentioned.

The right of the plaintiff was by virtue of the attachment in favor of Heath. It was his duty to take the property into his actual custody. When in his custody, the same could not be taken from him, against his consent, except by writ of replevin. All subsequent attachments on the same property would be subject to the first. In Massachusetts, no attachment could be made by any other officer. In this state different officers might probably attach the property, and create a lien thereon, but still could not take the same out of the possession of the first attaching officer.—*Hall vs. Walbridge*, 2 Aik. 215.

The right of the defendants accrued from the delivery of the property to them, and from their contract. As between them and the plaintiff, the possession and the right of possession remained, as before, with the plaintiff, for *their possession* was his. Whatever attachments or executions he might receive, and levy on this property, must therefore be subject to the first, as it would be no more than an attachment of property in his possession. It has been supposed that because the property attached was suffered to go back into the hands of Abbott, the original debtor, it was, therefore, liable to be taken again to satisfy his debts, and might be taken by the same creditor and the same officer. This would be

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carrying the doctrine of a fraud in law to a most unreasonable extent, and would subject the doctrine itself to the charge of folly and inconsistency. It appears to me the whole argument drawn from this, may be answered by inquiring whether if Mr. Beach, the present plaintiff, had suffered the property to remain with Abbott, the debtor, *without taking a receipt*, he would have been compelled to serve the attachment of Mr. Steele on the same property, and thus defeat himself of all claim under the attachment of Mr. Heath, be compelled to appropriate the property for the benefit of Mr. Steele, and make himself liable to Mr. Heath? Certainly he could not have subjected himself in this way.

A sheriff attaching property, or his receiptors, are liable to have their right to the same defeated by suffering the same to remain with the debtor, where it may be taken by other officers at the suit of other creditors. The law from principles of policy declares, that the first attachment shall be inoperative against other officers; that though it may be good as to the immediate parties, it is good for nothing as to others. But for the very reason, that it is good between the parties, an officer attaching and suffering the property attached to remain with the debtor, either with or without a receipt, cannot by taking the property again into his possession, make either the debtor or receipts-men liable in any action for not redelivering the same to him. It might as well be contended that, as a consequence of this rule of law, a purchaser who had suffered the goods purchased to remain with the vendor under a contract to return the same on demand, could attach the same as the property of the vendor, and then sue him on his contract for not returning it. We can see nothing in this principle of the law which would warrant a recovery by the plaintiff on this receipt against these defendants.

On any view which we have taken of this case, we are led to the conclusion, that the plaintiff, having taken into his own custody the articles attached by him at the suit of Heath, which he delivered to the defendants, under their contract to return the same to him when demanded, has no further claim against them on the receipt, unless the property was injured while under their control, but that their obligation was fulfilled when he took the same back into his actual custody. The same question, we understand, was decided in the case of *Scott vs. Harding and Caldwell*, in Orleans county, a few years since, which is not yet reported. From the statement of that case in the argument, as well as from the recollection of our brethren, who assisted in deciding the same, it

must have involved the very principle which is presented in this case. But were it a new question we should have arrived at the same result.

The judgement of the county court is affirmed.

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SYLVANUS C. HASKILL vs. WILLIAM R. ANDROS.

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1832.

A person's only cow is not subject to attachment or execution, though he reside in Canada, and the cow be casually found in this state.

Action of *trespass* for seizing and carrying away the plaintiff's cow. It appeared that the cow in question, was the only one the plaintiff had, and that the defendant had taken her in the capacity of an officer, by virtue of a writ of attachment at the suit of a creditor. The plaintiff was a native of this state, but, at the time the debt was contracted, on which the attachment was made, and for more than a year before, and at the time of said attachment, resided with his family at Stanstead, in the province of Lower Canada. The cow was kept and used, at the time of the attachment, at the plaintiff's residence in Stanstead; but she had casually strayed into this state, within the precincts of the officer, where she was seized by virtue of a writ of attachment as before mentioned.

The parties agreed on a statement of facts, on which a judgement was entered by agreement for the defendant; and the cause was ordered to pass to the Supreme Court for a final hearing.

The case was argued by *Mr. Redfield*, for the plaintiff, and by *Mr. Leslie*, for the defendant.

WILLIAMS, J., delivered the opinion of the Court. The plaintiff brings this action to recover the value of a cow, which the defendant has taken from him by virtue of an attachment and execution. The taking is confessed. It is admitted, that it was the only cow of the plaintiff, and that the plaintiff, at the time of the attachment and levy of the execution thereon, resided in the province of Lower Canada. The only question is, whether the cow was, on that account, liable to be taken in execution.

The legislature from principles of public policy have thought proper to exempt from execution certain articles of personal property, and, from the same principles, have made provision, that a debtor imprisoned on execution may be the owner of that proper-



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ty, and still be admitted to the oath provided for poor debtors. This property, thus exempt, is not considered as subject by law to the debts of the owner.

The language, by which the exemption is declared, is plain and explicit, and leaves little or no latitude to courts or juries either in ascertaining the meaning, or determining the cases to which it is applicable.

It is sufficient, in general, for the court to know what the legislature have done, and not enquire into the reasons which actuated it. Although it is a legitimate rule in the construction of all statutes, particularly remedial ones, to enquire after the old law, the mischief and the remedy ; and so construe the statute, as to suppress the mischief and advance the remedy. Probably no rule for the interpretation of statutes has led to as much judicial legislation as this ; and courts, by indulging in fanciful conjectures as to the reasons for which laws were enacted, have too often been led to depart from the law, and make a new one entirely. Hence there should always be a great deal of caution used when we resort to this rule to interpret a statute.

Where, however, the language made use of by the legislature is clear and explicit, there is no necessity of resorting to this, or any other rule, to ascertain its views in passing a statute ; but we are only to endeavour to give effect to its intention, learning that intention from the language which it adopts.

In the statute under consideration, there seems to be very little room to doubt its meaning. The language is, that the officer shall levy the execution upon the property of the debtor, “ always excepting one cow, and such suitable apparel, bedding, arms, and articles of household furniture, as may be necessary for upholding life.”

As to all the other articles, except the cow, they are to be exempted according to the different circumstances, or situation of the individual ; and, of course, some discretion must be used, both by officers in executing, and by courts in deciding how far the exemption shall extend. The judgement must be exercised in determining the extent ; as what would be suitable and necessary in one case, would be unsuitable and more than necessary in another. A regard must, therefore, be had to the situation of each debtor, as well as the number and ability of his family. It is not so, however, in relation to a cow ; probably because it was an article of small value, and from the difficulty of ascertaining at all times, whether it was necessary or not. It might be said that the

cow, from disorder, as was supposed in the argument, might be valueless to a family ; or that the owner had no family ; or that he was residing out of the government ; or in such a situation that he would not want the milk of a cow. These, and a variety of other considerations, might be urged, and render it at all times inconvenient, and frequently difficult to determine, whether it was necessary or expedient, in each particular case, to exempt this article from being taken on execution.

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To prevent any of these enquiries, one cow is exempted from sale on execution, whatever may be the situation or circumstances of the debtor. It is to be considered as though the exception was inserted in the execution.

There is nothing in this case to distinguish it from any other, where the only cow has been taken on execution. The person taking is liable to an action at the suit of the owner, and must respond in damages the value of the property taken.

It has been correctly urged, that the law of the place where a remedy is attempted to be enforced, must always govern the proceedings had to enforce the remedy. Both principle and the authorities clearly establish this position. Whatever remedy our laws give to enforce the performance of a contract, will equally avail the citizen or the foreigner ; and they equally must be subject to any restraints which the law imposes upon them. Our inhabitants can have no greater rights in enforcing a claim against a foreigner, than an alien can have in enforcing a similar claim against one of our own citizens. Whoever submits himself or his property to our jurisdiction, must yield to all the requirements which are made of our citizens in relation to the collecting of debts, or maintaining suits ; and is clearly entitled to all the benefits, exemptions, and privileges, to which other debtors or suitors, belonging to our own state, are subject or entitled. If the one can hold a cow, suitable wearing apparel, and necessary household furniture, without having the same taken from him by execution, so can the other. Nothing short of the express language of a statute would justify us in saying, that a person may, by virtue of an execution, be stripped of his wearing apparel, his necessary household furniture, and his only cow, merely because he resides under another government, when a person residing here would not be subject to the same inconvenience and distress. At any rate, we are not disposed to give a forced construction to a statute, and pervert its plain and obvious language and meaning, to effect this purpose.

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It is the opinion of the Court, on the case stated, that the property for which this action was brought, was exempt from execution ; that the plaintiff may maintain an action therefor, and is entitled to judgement on the case stated. The judgement of the county court, must therefore be reversed, and judgement rendered for the plaintiff.



ORLEANS,  
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CHARLES DURKEE vs. LEANDER LELAND.

An attorney on the trial of a cause is not obliged to produce a paper which his client has entrusted to him as counsel in the case, and in professional confidence.

*Reasonable* notice must be given to a party to produce a paper in his possession, or he cannot be compelled to produce it. Notice given at the trial of a cause is not sufficient.

Where one received a bill of sale of certain articles of personal property, and was thereby authorized to take possession of them whenever he chose, and account for them to the owner at what they might bring at auction,—it was held, that he was accountable for those only of which he had taken possession, and not even for those, unless he had so conducted as to manifest an intention to make them his own, or had made them his own by such gross negligence as ought to make him accountable for their value.

Assumpsit on a promissory note, dated May 2d. A. D. 1828, for \$49,90 and interest. Plea, the *general issue*, with notice of payment in a waggon and sundry other articles, herein after mentioned. The plaintiff having proved, and read in evidence, the note declared on, the defendant called John H. Kimball, Esq. attorney of the plaintiff, as a witness to prove, that the plaintiff held a bill of sale of a quantity of sap buckets, one or more cauldron kettles, and a sap holder, executed by the defendant to him on the 3d day of May, A. D. 1828 ; which property the plaintiff was to dispose of, and apply the proceeds on the note in question. The witness objected, that if he had seen or knew of such a paper, his information on the subject was communicated by the plaintiff to the witness as counsel in this cause, and in professional confidence. But the court decided that he was not privileged from disclosing the fact, if within his knowledge, that such a paper existed, and what had become of it, though he was not at liberty to disclose to the prejudice of his client, any declarations of his, made to the witness as counsel. He then testified, that the plaintiff lodged such a paper with him when he left the note to be sued, and that he had the paper in court. The defendant called for the production of it, to be used as evidence on the trial ; to which the counsel

for the plaintiff objected ; but the court ordered it produced, and it was read in evidence, and was as follows :

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" *Barton, May 3d, 1828.*

This day sold and delivered to *Charles Durkee*, 250 sap buckets, one cauldron kettle, and one sap holder ; said articles are now in the sugar lot belonging to *Albert Leland*. Said *Durkee* shall have a right to take possession of said property when he shall see proper, and account to me for the same at what said articles will bring at auction.

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vs.  
*Leland.*

*Leander Leland.*"

It was admitted that a waggon, worth about \$25,00, had been received as part payment of the note, and that the plaintiff had sold the cauldron kettle, mentioned in the bill of sale, for \$4,00, which was also to be applied. Evidence was given tending to show, that the note in question was given on a settlement between the plaintiff and defendant, and constituted the only demand which the plaintiff afterwards held against the defendant, and that the object of the bill of sale was, to provide means for the payment and satisfaction of said note. The evidence also tended to show, that at the time of giving said bill of sale, the property specified was in the different places therein mentioned ;—that the plaintiff afterwards made some attempts to sell the same at private sale ; and that an agent of his let out fifty of the buckets for use one season ; but it did not appear that the plaintiff had in fact sold any of the buckets or the sap holder, but the same still remained scattered in the neighbouring sugar places, and had been suffered to go to waste and decay. The plaintiff contended, and requested the court to charge, that he was under no obligation to take possession or make any disposition of the property mentioned in the bill of sale, and had at all times a right to sue the note and collect any balance not paid by the actual proceeds of said property. The court instructed the jury, that the bill of sale, taken in connexion with the evidence of the purpose for which it was executed, was to be construed as a pledge, or rather a mortgage, of the property to the plaintiff to secure the payment of the note in question, with a power to sell, the better to carry the object into effect ;—that it did not operate at once as payment or part payment of the note, but passed the legal interest in the property to the plaintiff, whose duty it was to execute the object of the transfer, or else to renounce the benefit of it, and give notice thereof to the defendant ;—that the provision for selling at auction was introduced for the benefit of the plaintiff, who might waive it, and make any other disposition of the property, if equally beneficial to the defendant ;—that the plaintiff would, therefore, be bound to account, by way of

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payment on the note, for any of the property which he should sell, appropriate to his own use, destroy, or suffer to become useless and of no value, for want of reasonable and proper care on his part; and that, if they found from the evidence that property mentioned in the bill of sale, sufficient at a fair cash value, to pay the balance of the note, after deducting the wagon and cauldron kettle, had thus become useless and of no value, through the want of such care on the part of the plaintiff, they would find the note paid, and return a verdict for the defendant; and if to an amount less than the balance of the note, then the plaintiff would be entitled to their verdict for the difference. Verdict and judgement for the defendant.

The plaintiff filed exceptions to the opinion and charge of the court; whereupon the case was brought up to this Court, where, after argument by *Kimball* for the plaintiff, and *Cushman* for the defendant,

The opinion of the Court was delivered by

WILLIAMS, J.—The first question in the case is, whether Mr. Kimball, who is an attorney of the court, and was the attorney of the plaintiff in this case, on the trial in the county court, was properly compelled to testify in relation to the papers in his possession, and to produce the same. Attornies are not compelled, nor are they permitted, to give evidence of facts which come to their knowledge from the confidential communications of their clients in the course of their professional duty. There seems to be some discrepancy in the authorities, whether the rule, as to the exclusion of the evidence of solicitors and attornies, extends to all communications made by a client, while consulting them professionally, or whether it is confined only to those made for the purpose of instituting or defending an action. *Lord Tenterden*, in the case of *Wadsworth vs. Hamshaw and Aspinall*, (found in a note to the case of *Cromack vs. Heathcote*, 2 B. & B. 4,) and afterwards in the case of *Williams et al. vs. Mudie et al.*, 1 Car. & P. 158, was disposed to confine it to the latter case; and he was followed in this by *C. J. Best*, in the case of *Broad vs. Pitt*, 3 Car. & P. 518. These, however, were decisions of *nisi prius*. It appears to me that the rule laid down by the court of common pleas, in the case of *Cromack vs. Heathcote*, 2 B. & B. 4, is the better law, and is confirmed by the current of authorities. I think *Scarlett*, in the case of *Williams vs. Mudie et al.*, is fully sustained in his assertion, “that the law is clear, that any communication to an

attorney professionally, whether about an estate, or otherwise, is a privileged communication." In the present case, it may be remarked, that all the information, which Mr. Kimball had upon the subject of the paper, was communicated by the plaintiff to him as counsel in the case, and in professional confidence. Under these circumstances, he would not be compelled or permitted to give any evidence in relation to those communications, nor could he be compelled to produce any papers which had been intrusted to him by his client. The possession of the attorney was, for this purpose, the possession of the client. An attorney or counselor is not obliged to produce to a grand jury a paper entrusted to him by his client.—*State vs. Squires*, 1 *Tyler*, 147 ; *Anon.* 8 *Mass.* 370. The most which could be required of Mr. Kimball, was to state whether such a paper was in existence, and where he last saw it, according to the cases of *Kingston vs. Gale*, 8 *Viner*, 548 ; *Brandt vs. Klein*, 17 *Johnson*, 335 ; *Jackson vs. McVey*, 8 *Johnson*, 330 ; though it appears to me, that going thus far is at variance with the general principle applicable to that subject, if the deed or writing was communicated or intrusted to the attorney in professional confidence. In relation to papers which are in the hands of the opposite party, the common rule is, that if he refuse to produce them on reasonable notice, secondary evidence may be given of their contents. But notice given at the trial is not sufficient.—1 *Starkie*, 539, (*cases cited in note.*) It is provided by statute, that parties may be compelled to produce papers under penalty of a nonsuit or default in case of neglect ; but this can only be enforced after reasonable notice ; and the statute applies only to the parties and not to their attorneys, counselors, or solicitors.

Neither the rule of the common law, nor the statute, authorized the defendant to call on the court to compel Mr. Kimball to produce the paper in question. We are of opinion, therefore, that the county court ought not to have compelled Mr. Kimball to produce the bill of sale, and that his duty to his client required him not to produce it, except in obedience to an order of the court.

We are of opinion, also, that the bill of sale, as it is termed, did not impose upon the plaintiff precisely the duty which the county court thought was required of him, as appears by their charge to the jury. The bill of sale was evidently intended as a security for his demand against the defendant ; and further to enable him to realize a more speedy payment than he could otherwise obtain.

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It was left optional with him at what time to take possession of the buckets and kettle, or whether to take possession or not. Until he did take the actual possession, there was nothing to prevent the defendant from using them as before, or taking any measures to secure them from dilapidation and waste. By paying the note, they would have immediately become the property of the defendant. The plaintiff could only be accountable for those of which he had the possession; and not for those, unless he had so conducted as to manifest an intention to make them his own, or had made them his own by such gross negligence as ought to make him accountable.

The judgement of the county court is, therefore, reversed, and a new trial granted.



FRANKLIN,  
January,  
1832.

ABNER EASTMAN vs. JOHN CURTIS.

Title acquired by levy of an execution is not rendered invalid by reason of any irregularity or erroneous decision of the court in rendering the judgement on which the execution issued. The judgement is sufficient until set aside or reversed in some of the ways which the law has provided.

It is not necessary for an officer, levying an execution on real estate, to state in his return that he has demanded the money, &c., nor that the debtor neglected to pay it, or to exhibit personal property: these preliminary duties are not essential to pass the title.

Where an officer extends an execution on personal property, when the amount of the execution is offered to him, or upon real estate, when the debtor exposes sufficient personal property, he will be liable to any one who is aggrieved thereby. *Sed dubitatur*, whether such a misfeasance of the officer would affect the title to property acquired by virtue of the levy.

When an officer's return on an execution, extended on land, is conformable to forms which have been long in use, it is sufficient, though it contain some technical defects.

Where an officer stated in his return that the land extended on had been appraised by persons *mutually appointed by the parties*,—it was held to be a strict compliance with the statute.

Where an error is committed by an officer in his return in writing an important word, yet, if nothing can be intended by it but the word required by law, the return is sufficient.

It is not a valid objection to a title acquired by levy of an execution, that it does not appear from the return the land was shown to the appraisers, nor that they made the appraisal in view of the premises, nor what means they took to ascertain the value.

Where an officer stated in his return that he had sworn the appraisers as the law directs, without otherwise saying what oath he administered to them, the return was held to be sufficient.

Sheriff's deputies are recognized by the statutes as distinct officers; and their doings should be certified in their own names, and not in the name of the sheriff.

The statute does not require that an officer shall affix a seal to a return made on an execution levied on land:



Nor that a certificate of the appraisal should accompany the return.

If an officer charges more than legal fees for levying an execution, the title to property acquired by such levy is not thereby affected.

Where judgement was recovered by an administrator, on which execution was issued and extended on real estate, and the return of the officer was in the common form, not designating whether the land was set off to the administrator or heirs,—it was held to be sufficient.

The return of an officer on an execution, as to the facts therein stated, is conclusive on the parties and all claiming under them.

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January,  
1832.

Eastman  
vs.  
Curtis.

This was an action of *ejectment* for land in St. Albans. Plea, *not guilty*, and issue to the court. It was admitted on trial, that the title to the land demanded was in the plaintiff, and that he had a right to recover, unless he had been divested of his title by virtue of the levy of an execution in favor of Robert Peaslee, administrator of Zacheus Peaslee, against Silas Hathaway, Erastus Hathaway, Levi Hathaway, James Brown, and the plaintiff, under which the defendant claimed the right of possession. The defendant produced in evidence the record of the judgement on which the execution issued, from which it appeared, that the original action was on a jail bond; and that the defendants pleaded a plea of set off thereto;—that Peaslee, the plaintiff, replied, and pleaded the *general issue* to the plea of offset; and gave notice, under the statute, that he should prove that said Zacheus Peaslee did not at any time within six years before the commencement of said action, nor within six years before filing said plea, nor within six years before the said Zacheus' death, undertake and promise, as alleged in said plea of offset; to which replication the defendants demurred; that the court thereupon decided that the defendants' rejoinder be held for nought, and directed that they should close the issue *instantly*, which plaintiff had tendered in his replication, and in default thereof, that judgement be rendered against them for the amount claimed by the plaintiff; and that the defendants neglecting to comply with the order of the court, judgement was rendered accordingly. The present defendant objected to the admission of this record, because it appeared that judgement had been rendered by way of amercement or penalty; and contended, that the court had no power to render a judgement under such circumstances. But the objection was overruled. The officer's return on the execution was as follows:

State of Vermont, )  
Franklin, ss. ) Know all men by these presents, that I,  
November 9th, 1818. ) Joseph Weeks, sheriff's deputy of the  
within execution to me directed, and by direction of Sanford Gadcomb, attorney for the creditors within named, did, at St. Albans,

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in said county, the 9th day of November, A. D. 1818, levy the said writ of execution on a certain tract or parcel of land, shown to me by the said Sanford Gadcomb, attorney, as aforesaid, as the property of one *Abner Eastman*, one of the within named debtors, situate, lying and being, in St. Albans aforesaid, and bounded as follows ; to wit : beginning at the south-east corner of lot no. 17 ; thence running west, on the south line of lot no. 17, one hundred and twenty four rods and thirteen links, to the stage road ; thence running northerly, on the east line of the stage road, thirty four rods ; thence running easterly, a parallel line with the south line of said lot, one hundred and twenty one rods ; thence south, thirty six degrees west, thirty four rods, to the first mentioned bound ; containing twenty six acres and twelve rods of land. And afterwards, to wit, at St. Albans aforesaid, on the day and year last aforesaid, I caused the same land, with the appurtenances thereof, to be appraised by Abijah Stone, Orange Ferris, and Nehemiah W. Kingman, good and judicious *disinterested* freeholders of the vicinity, being in the town of St. Albans, aforesaid, who were mutually appointed by the said Sanford Gadcomb, attorney, as aforesaid, and the said *Abner Eastman* ; and I have sworn them respectively as the law directs, who, on their oaths, have appraised the same at the sum of seven hundred and twenty nine dollars and five cents ; and I have caused the within execution, with this my return hereon endorsed, and the bill of fees hereunto annexed, to be recorded in the town clerk's office in St. Albans.

*Joseph Weeks, deputy sheriff.*

Several objections were taken to this return :

1st. That it did not appear therefrom that the officer repaired to the debtors' place of abode, and demanded payment of said execution ; nor that said debtors, their agents or attornies, had refused to expose and tender personal estate, sufficient to satisfy the execution.

2d. That it did not appear the statute had been complied with in the appointment of the appraisers ; that the parties could not agree on all three of them ; but each party should appoint one, and those two mutually agree on a third.

3d. That it did not appear the appraisers were "judicious and disinterested" freeholders ;—that the word *disinterested*, used in the return, could not mean, "disinterested."

4th. That it did not appear the land was shown to the appraisers, nor that they saw it, nor in what manner they ascertained its value.

5th. That it did not appear in what manner the appraisers were sworn ;—that the form of the oath required by law should have been inserted in the return.

6th. That it did not appear the execution had been extended by an officer known in law. FRANKLIN,  
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7th. That the return ought to have been authenticated by a seal. Eastman  
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8th. That the officer had charged more fees than by law he was entitled to.

9th. That it did not appear the value of the land had been applied on the execution.

10th. That it did not appear whether the land had been set off to the administrator, or to the heirs.

11th. That a certificate of the appraisal, signed by the appraisers, ought to accompany the return, and that it should appear they appraised the premises *at the true and just value in money*.

These objections were all overruled by the court, and the record of the levy admitted. The plaintiff then offered evidence to show, that *Eastman*, at the time said execution was extended on the premises, was sick, and had no voice in the appointment of the appraisers. This evidence was rejected by the court. A judgement having been rendered for the defendant, exceptions were taken by the plaintiff; whereupon the cause was ordered to pass to the Supreme Court for a final hearing on the several questions of law raised in the case.

After argument,

WILLIAMS, J., delivered the opinion of the Court.—This is an action of *ejectment* to recover the title and possession of land which was taken from the plaintiff by the levy of an execution on the 9th of November, in the year 1818. It is admitted that the title is in the plaintiff, unless he was divested of it by that levy. Several objections have been taken to the judgement and levy, which the plaintiff says show that the levy was void. It is to be remarked in the outset, that the levy of the execution on the land in question extinguishes so much of the plaintiff's debt as the value of the land, as found by the appraisers. The statute of limitations has run on that judgement. If the plaintiff recovers, the judgement is satisfied, and he recovers back the property by which it was satisfied. This would induce us to examine the subject with caution and deliberation, and if the result should be, that the land did not pass by the levy, a bill in chancery might compel the plaintiff either to pay the debt, or further assure the title acquired under the levy. Taking property on executions, it is true, is a proceeding "*in invitum*," and the forms and requi-

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sites of the law must be observed. It is also true, that levying upon land is taking the property of a debtor without sacrifice, at a full and fair value, and in discharge of a legal obligation. In short, it is only doing what the debtor ought to do, taking his property to pay his debts ; and herein it differs from those cases where a sale is made to enforce the performance of a public obligation imposed by law, and not by the personal contract of the obligor, as sales for taxes, or sales of property distrained, or property impounded. We have examined all the objections which have been taken, and find none of them sufficient to avoid the levy. The judgement, on which the execution issued, which was levied upon the land in question, appears to have been regular. Whether the court exercised their powers discreetly in ordering the party to close an issue tendered, or in entering judgement, it is not for us to enquire. If the judgement ought to have been set aside or reversed, it should have been done in some of the ways which the law has provided. It is sufficient for the defendant that it is not void.

The levy in many particulars, where it has been objected to, appears to have been according to established forms. Other objections have been taken which have been ruled to be insufficient. It is not necessary for the officer to state that he has made a demand of the money, &c., as it is not essential to pass the title. The statute subjects real estate to be taken at the election of the creditor when the debtor neglects to expose and tender personal estate sufficient to satisfy the execution. If an officer should levy on real or personal estate, when the amount of the execution was offered to him, or upon real estate, when the debtor had exposed sufficient personal estate, he would be liable to any one who was injured thereby ; but I should very much doubt whether his misfeasance in this particular would affect the title of the purchaser of personal estate which he sold at auction, or of the creditor to whom the real estate was set off. At any rate, this return in these particulars is conformable to the forms which have been long in use, and is not to be disturbed here upon an objection which is so purely technical.

The second and third objections are wholly unfounded. If the parties mutually agreed upon the appraisers, each one did in fact choose an appraiser, and there was a strict compliance with the letter of the statute. It is at least singular, that the debtor himself on the execution should raise the objection.

The mistake in writing the word *disinterested* is too trifling to

merit a serious consideration. Nothing else can be understood than that the appraisers were "disinterested," [as the statute requires.

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The objections, that it does not appear what land was shown to the officer, or what oath was administered, were considered as unimportant in the case of *Galusha vs. Sinclair*, 3 *Vt. Rep.* 394.

It is not true that a deputy sheriff is not an officer known in law. On reference to the statute concerning sheriffs, and also to other statutes, sheriff's deputies are recognised as officers, and made liable to fine on conviction for neglect of duty, &c.

It is not required by statute that the return should be under seal, nor is it required that the certificate of the appraisers under their hands, should accompany the return; and it would only encumber the records if these, or the certificate of the oath, should be separately placed on the execution and recorded.

If the bill of fees was too high, the sheriff was liable; but as this levy was only in part satisfaction, the fees should have been reduced to what were legal, and the appraisal applied in satisfaction of the legal fees, and the residue on the execution, and an alias would have issued only for the just balance; but the misconduct of the officer in this particular cannot destroy the levy. Neither do I think that it could by any possibility have rendered the levy void if the appraisal had been in full satisfaction of the execution and bill of fees, although part of the fees were illegal. A question somewhat similar was decided by *Judge Livingston*, in the circuit court, in favor of the levy.

The 9th objection is not true in point of fact. It appears this levy was made on the property of different debtors, and at different times; and the aggregate of the several levies was applied. The whole of these levies constitute but one return.

The objection that it does not appear whether the land was set off to the administrator or heirs, and also the question raised on the offer of the plaintiff to disprove the fact certified by the officer, that the appraisers were mutually chosen, were both considered in the case of *Hathaway vs. Phelps*, 2 *Aikens*, 84, and overruled. The land was of course set off to the creditor; and the return of the officer in relation to choosing the appraisers, is conclusive upon the parties and all claiming under them.

The case of *Hathaway* and *Phelps* might probably be considered as an authority in all the points in this case. In that case the question arose on objections taken to the levy of the same execution on the property of Erastus Hathaway, one of the judge-

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ment debtors named in the said execution. I have no doubt, from reading that case, that the levy was in the same form, and liable to all the objections which have been raised to this. That case appears to have been much contested. The levy was called in question, and was established. Whether, however, these objections which have been raised, were there discussed or not, we are all of opinion in this case, that the proceedings on the judgement and execution against the plaintiff, were regular ; that there is no valid or plausible objection to the levy, and that the plaintiff by that levy was divested of all interest and title to the land for which the suit was brought.

The judgement of the county court is affirmed.

*Hunt & Beardsley*, for plaintiff.

*Turner*, for defendant.



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NATHAN PUTNAM vs. BENJAMIN SMITH, JUN.

Where one conveyed a piece of land on which there was a large quantity of free-stone, disconnected from any fixed ledge, and partly imbedded in the earth, and by the deed reserved *all the free-stones on said land to himself, his heirs and assigns, with the privilege of carrying off said stones*,—it was held, that the reservation did not extend to a ledge of free-stone under ground, and not known to the parties at the time of the conveyance ; and that parol evidence was admissible to show the situation and quantity of stones upon the surface at the time of the conveyance, and that the ledge under the surface was not then known to the parties.

This was an action of *trover* for sixty tons of free-stone, alleged to have been taken and carried away by the defendant, and converted to his own use. It appeared that on the 9th day of August, 1814, the plaintiff conveyed to one Minard sixty acres of the south part of lot no. 5, in the town of Grafton, and the deed contained the following reservation ; viz : “ with the reservation of all  
“ the free-stones on said land to myself, my heirs, or assigns, with  
“ a privilege of carrying off said stones in the most convenient  
“ place to the highway.” The defendant claimed a right to the stones in question by virtue of a subsequent deed to him from said Minard, conveying, without any reservation, the land above mentioned, and from which the stones were taken. The plaintiff claimed the right to maintain the action by virtue of the said reservation contained in his deed to Minard. At the trial in the county court the plaintiff introduced evidence showing, that the defendant had taken and converted to his own use about sixty tons of the stone ledge, on said land, of the kind which in that vicinity is called *free-stone*, taking the same from the ledge from six to

twelve feet under the surface of the ground ; and that the ledge extended southward, and was above the surface and visible from two to four rods south of the place where the defendant dug the stone in question, and a little off of lot no. 5. The defendant produced a deed from the plaintiff to said Minard, dated August 30, 1814, conveying to him two acres of land adjoining the said sixty acres, on the south side, being the same land on which said ledge was above the surface of the earth, as before mentioned : also a deed from Minard to the defendant conveying the said two acres, dated March 20, 1823. The plaintiff objected to the admission of these deeds as evidence ; but the court overruled the objection. The defendant then introduced testimony—that was objected to by the plaintiff, but was admitted by the court—which tended to show, that when the plaintiff conveyed the said sixty acres to Minard, there were from thirty to one hundred tons of free-stones lying upon the land, disconnected from any fixed ledge, which were of different sizes, from very small to two or three tons in weight ;—that these were somewhat imbedded in the earth, the upper parts being above ground, and the most elevated points weatherbeaten and of no value ; but lower down they were solid, and were useful for fire-places, jambs, manteltrees and inkstands—That at that time no ledges were worked or opened in the vicinity of the ledge in question ; and that it was not then known, that said ledge extended under the surface as far north as the place where the defendant severed the stones in question.

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The plaintiff requested the court to instruct the jury, that said reservation included all the free-stone and free-stones upon the said sixty acres, as well the fixed ledges as the loose stones. But the court charged the jury, that if they believed the testimony above mentioned, with regard to the situation and quantity of stones upon the surface, and the situation of the ledge, as then unknown to the parties, they would consider the reservation satisfied without extending to said ledge. The plaintiff excepted to the decision and charge of the court ; whereupon the cause was ordered to pass to this Court.

*The plaintiff's counsel contended,—1st.* That his deed to Minard extended to all free stone on or under the surface of the land.—*Leonard vs. Judd, Bray. Rep.* That the stone is a part of the soil—and *on* is *super*—not the surface, but the bottom.

2d. That the deeds offered by defendant were not admissible to affect the construction of the exception in plaintiff's deed. The



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deeds of Minard to defendant are *inter alios*. The deed, plaintiff to Minard, confirms plaintiff's construction of said exception. He then owned both lots, and sells the stone on the one—having as he supposed reserved the stone on the other lot. All the deeds to defendant are of a long subsequent date.

3d. The evidence of there being other stones, was inadmissible. It is inadmissible to vary the construction of the deed. It had no tendency to show the actual intention of the parties.

4th. The same may be remarked, in relation to the testimony, that no ledges had been opened in the vicinity.

5th. And the same that the extent of the ledge was not known. It was equally unknown to both parties, and it might well be said it could not have passed had there been no exception. But though the fact was not then known, that is, ascertained, yet it was from the nature of the case a probable fact. It is objected that there is no reservation of *digging* the soil. When a thing is granted, all the means to obtain it are granted also.—*Shep. Touchstone*, 85. The defendant's construction would exclude all the stone embedded in the soil. The verdict was found on all the facts: if any were improperly admitted, the plaintiff is entitled to a new trial.

*The counsel for the defendant*, contended, That the exception did not entitle the plaintiff to any *rocks* or *ledges*, or to any *stones* wholly buried in the land; but only to such stones as were *on* or *upon* the land.

I. Because such is the fair and grammatical construction of the words. They are called *free stones*, and not *freestone*, which is the usual and proper mode of expression, when speaking of the kind and not the individuals. Thus, we say all the *freestone*, if we mean all of the kind; but, speaking of particular individual ones, we say the "*free stones, those free stones*;" besides, the words are not even compounded into one, as is always the case when speaking of the kind, as all the *freestone*; but, as if meant to preclude such a meaning, it is not only put in the plural, but is decomposed, and the two words used, *free stones*. As if still more to prevent dispute, when they are subsequently spoken of in the deed, they are called "*stones*" simply, viz. "carrying off said stones;" from which it is evident that the parties were speaking of something which in the state it then was, might be carried off; but whoever heard a ledge called a stone, or of carrying off an entire ledge, calling it a stone? In this view the difference between

the description here, and that in the lease in *Brayton's Reports*, is quite manifest ; for there it was *rocks* and *stones* ; and a ledge may be a rock, or composed of rocks. They are not only said to be stones, but stones *on* the land, which, in fair grammatical construction, can only apply to such things as are in some part superior to, or forming the surface ; the preposition *on* not being used in common acceptation in reference to any thing which *wholly* encloses it. It is apprehended that the only difficulty of construction, in regard to this word, arises from the difficulty of drawing the limit where the thing spoken of is partially enclosed ; but that when the thing is *wholly* enclosed, or *wholly* superior, the difficulty vanishes. The language used in the sense, for which the plaintiff contends, is not conformable to legal language, or to the words used in conveyancing. In all cases in the books where mines, quarries, coal, stone, &c., in the bowels of the earth, and on the surface, are both conveyed, or excepted, the words "*in and on the land or premises*" are used. See *Cruise, Wood, Bridge-man, passim*. And if there is any departure from this usual language, it has been made by the plaintiff himself. The intention is still more apparent from the circumstance, that while the plaintiff has been careful enough to reserve the right of way to carry off the stones on the land, he has reserved no right of digging or subverting the soil for the purpose of obtaining stone under the soil. If it be said, this right is incident to the exception, so is the right of way, and the plaintiff having omitted the one, while he expressly mentioned the other, shows that the former was not intended. If it be said, that this construction would deprive the plaintiff of the power of raising the stones, which are confessedly reserved, by preventing him from inserting underneath them the proper levers, &c., the answer is, that there is a wide difference between using the means necessary to carry off stones *lying upon the land, although somewhat bedded*, (as the case finds these to be,) and digging to discover, and raise from the bowels of the earth, any quantity which may be situated between the surface and the centre. Besides, would not such an exception, as is contended for, be void, as enabling the plaintiff to wholly subvert the defendant's soil, and deprive him of the profits of his land ? *Shep. Touch.* 79 ; *Moore*, 870 ; *Co. Litt.* 150. Nay, more, he would be entitled to all the stones of that quality, whether great or small, and in a soil so filled with them it would be a complete defeat of the grant. Furthermore, the construction contended for by the plaintiff, is the most favorable which could possibly be

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made for the grantor, and the most unfavorable for the grantee; which is directly contrary to the rules of law.

II. For it is a primary rule of law, that a deed shall be taken most strongly against the grantor, and that if it can be construed different ways, it shall be taken most favorably for the grantee. *Plowden*, 161, *Throckmorton vs. Tracy*; *Sheppard's Touchstone*, 87; *Co. Litt.* 183; 1 *H. Blackstone*, 27, *Davis vs. Williams*; 4 *Mass.* 205, *Worthington vs. Hilyer*; 16 *John.* 172, *Jackson vs. Blodget*. And the same rule applies to an exception or reservation, viz. that it shall be taken most strictly against the exceptor or reservor.—*Dyer*, 377 a, *Parmer vs. Prowse*; *Plow.* 171; *Hill vs. Grange*, *Moore* 113, pl. 254; *ib.* 870, pl. 1208; 10 *Co.* 106-8, *Humph. Lofield's case*; 1 *Brownlow*, 61, *Young vs. Milton*; *ib.* 108, *Smith vs. Newsom*; *Yelverton*, 159, same case; *Shep. Touch.* 100; *Latch.* 44, *Seely vs. Aole*; *Hardres.* 89, *Cather vs. Merrick*; 2 *Mad. R.* 93, *Ingram vs. Totkill*; 3 *Mad.* 230, *Osborn vs. Stewart*; 2 *Saund.* 165, *L\*\*\*\*\* vs. Carue*; 4 *Taunton* 316, *Windham vs. Way*; 3 *Johnson*, 382, *Jackson vs. Hudson*; 8 *Johnson*, 406, *Jackson vs. Gardner*. Nor does the case in *Brayton*, 230, *Leonard vs. Judd*, militate against defendant, being perfectly conformable to the doctrine laid down; for there it was construed most strongly against the lessor, and the lessee permitted to dig for the purpose mentioned to any extent. Besides, it was a lease of rocks as well as stones, and from the nature of the country, probably all these was for the grant to operate upon. If it be asked how the court can know the nature of the country? it is answered quite as well as the court of C. P. could know that Devonshire was an apple country, in 4 *Taunton* 316, *Windham vs. Way*, which brings us to consider

III. The admission of parol testimony. Defendant contends, that it was properly admissible to show the situation of the premises, and extent of the grants, and to rebut plaintiff's parol testimony of the usage of the words.—4 *Taunton ut sup.* supposes such inquiry. In 1 *H. Bl.* 27, *Davis vs. Williams*, it is said by Lord Loborough, that a devise of all the lands will not carry leasehold lands if there are freehold to which the words will apply; and this can only be known by parol testimony.—1 *Taunton*, 500, *Roberts vs. Carr*; 1 *D. & E.* 701, *Doe vs. Bart*, 10 *Mass.* 459; *Leland vs. Stone*; 1 *Mason*, 19; \*\*\*\*\* vs. *Dickson*; 6 *Mass.* 116, *Foster vs. Woods*. See also 16 *Johns.* 14, *Livingston vs. Ten Broeck*; 3 *Mass.* 361, *Adams vs. Frothingham*; 9

*East, 15, Doe vs. Dixon.* By this testimony it appears, that there were sufficient stones to satisfy the exception without resorting to the ledge ; that the ledge could not then have been meant by the parties to be excepted, since it was utterly useless ; that it was not even known to exist in or on the premises ; that if plaintiff's parol testimony showed that, in that neighborhood, the stones were called *free stones*, the second deed shows that, when speaking of the kind, it was then called *freestone*, viz. "a quantity of freestone."

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TURNER, J.—This case has been so elaborately argued that it is not necessary in deciding it, to enter into a minute and particular investigation of the several questions raised in the county court. As to the deeds which were objected to, and admitted, they were of no importance. They had no legal bearing on the case : nor were they calculated to mislead the jury. The only point is, whether the stone in question was included in the reservation contained in the deed from the plaintiff to William Minard. If the property passed by that deed, it is of no importance to the plaintiff, in whom it was ultimately vested, or what a subsequent grantee might think of the rights acquired by virtue of it.

The principal points raised at the trial in the county court were, 1st. Did the deed, on the face of it, reserve the ledge from which the stone in question was taken ? and 2d. Was parol evidence admissible to explain the deed, or, in other words, to direct the application of it ? The county court considered it doubtful whether it was the intention of the grantor, and so understood by the grantee, that the ledge in question should be reserved ; and they admitted parol evidence to show the situation of the premises at the time of the conveyance. It is not now important for us to decide, whether the deed, on the face of it, conveyed the property in question or not, as the parol evidence was admitted, and if legally so, then the deed is to be construed in connection with the evidence. So it becomes important to decide with regard to the legality of admitting the parol evidence.

The rules of law, with regard to the interpretation of deeds, have been long since settled, and, as the Court believe, settled on the soundest principles of public policy and general utility. Where the ambiguity arises on the face of the instrument, it must be solved by the deed itself. But if the meaning of a deed is clear and plain on the face of it, but doubts arise on the application of it, those doubts may be removed by extrinsic or parol evidence.

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The deed in question is plain on the face of it : it reserved all the freestones on the land, and the right of carrying them off to the highway. Every person would clearly understand what was meant by the reservation. But in carrying the contract into effect doubts arise from the situation of the property at the time of making the grant ; and, on the clearest principles of law, these doubts may be solved by extrinsic circumstances, showing that it could not have been the understanding of the parties that the reservation in the deed should extend to the ledge in question. We consider that the evidence was legally admitted, and that, taking the deed in connection with the parol evidence, the construction which the county court gave to it fully carried into effect the original intention of the parties.

The case of *Leonard vs. Judd*, (*Bray. Rep.* 230,) is very shortly and loosely reported, and it would not be safe to settle any legal principles on the authority of that case. That, as it appears from the report, was a case of a lease for 999 years, of certain premises, with the privilege of taking all the rocks and stones on the land. The Court decided that the lessee was not liable for digging, to any extent, for rocks, provided, he did not wantonly dig up the land to the injury of the lessor. We do not see how any question could have arisen in that case. The lessee would have had a right to occupy and possess the land during the whole term if the rocks and stones had not been mentioned in the lease ; and, most assuredly, when liberty was directly given by the lease to take the rocks and stones, the lessee had a right to make use of proper means to get them. It must be presumed that the rocks and stones were, at least, a part of the object which the lessee had in view in procuring the lease. That case has but a very remote resemblance to a case where one sells a farm, and reserves the right of carrying off the free-stones on the land to the highway.

From a careful examination of all the authorities cited, and others which were thought to have a bearing on the cause, we think the decision and charge of the county court were right, and that the reservation in the deed, taken in connection with the extrinsic evidence introduced on the trial, did not extend to the quarry beneath the surface of the earth, from which the stone in question was taken.

Judgement of the county court affirmed.

*Everett*, for plaintiff.

*Bradley, Phelps & Kellogg*, for defendant.

ERASTUS WATROUS vs. HORACE STEEL.\*

WASHINGTON  
March,  
1829.

When one enters a store or other place of public resort, the owner or occupier, after requesting him to depart, may lawfully use all necessary force, short of actual striking, to put him out.

But where W entered a book-store with license from the owner, and conducted himself peaceably, and S, who was a partner of the owner, and had a right to the possession in common with him, seeking for an occasion to lay hands on W, for the purpose of injuring and abusing him, used insulting language to irritate and provoke him, and requested W to leave the store; and W refusing to depart, S assaulted him and forced him towards the door,—it was held that S was liable in trespass for the assault.

*Trespass* for an assault and battery. Plea, *not guilty* as to all the trespass, except the assault and battery, and a justification of that in defence of the defendant's possession. Replication, that the trespass was committed of the defendants own wrong, and without the cause assigned; on which issue was joined.

On the part of the plaintiff, Daniel Bates testified, that in March, 1827, the plaintiff went into the book store of Geo. W. Hill & Co. and sat down, and soon fell asleep;—that the defendant spoke to him, but the plaintiff did not hear;—that the defendant spoke to him again, and told him he had found an article in a newspaper which suited his and Lewis's case;—that the plaintiff, after hearing the article read, asked the defendant if he thought it applied to his case; and the defendant said he did;—that the plaintiff asked him if he knew the facts, and the defendant said he did; that he had heard them from Lewis, and would believe him sooner than the plaintiff, for Lewis had never falsified his word to him as the plaintiff had;—that the plaintiff told the defendant he had never falsified his word to him, and if he reported such a story, it was false;—that the defendant told the plaintiff he should leave the store, and the plaintiff said he should not for him;—that the defendant told the plaintiff he lied, and the plaintiff said the defendant lied;—that the defendant said, if he repeated the words, he should leave the store; and the plaintiff told the defendant not to lay his hands on him again, for he should not leave the store for him; and that the witness heard a noise and scuffle, and, on turning round, saw that the plaintiff had been forced nearer the door than before. The plaintiff also produced and read the deposition of Geo. W. Hill, which was as follows:

"I, Geo. W. Hill, of Montpelier, in the county of Washington, State of Vermont, of lawful age, do testify and say, that on or about the 30th day of March, 1827, as I came into the office, Mr. Steel inquired of me if I had seen Esqr. Watrous. I told him I

\* This case and the preceeding one ought to have been published in the second volume of these Reports, but not having been furnished in season, they could not be inserted before.



WASHINGTON had not. He said he was looking for me. I inquired if he knew what he, *Watrous*, wanted. *Steel* said he had had some difficulty with him. Immediately *Watrous* came in. He appeared considerably excited; inquired of me if I calculated to have people insulted and abused in the store; and claimed protection. I told him I wished to have people treated civilly there, and that he was in no danger. I then inquired into the affair, and they, *Watrous* and *Steel*, went on to relate the circumstances which led to the difficulty, the particulars of which I do not now fully recollect, but, as near as I can, are as follow:—*Steel* was looking over the papers of the day, found an article to which he called the attention of *Watrous*, and said, it was an article for him, which was read on the request of *Watrous* by *Steel*. *Watrous* then inquired why for him. *Steel* replied, it was analogous to his case with *Lewis*. *Watrous* then said he had understood that *Steel* had censured him for suing *Lewis*, and asked him where he had his information respecting it, and said you had it from *Lewis*, I suppose. *Steel* answered, he had, and from others. *Watrous* then said, you believe all that *Lewis* says, I suppose. *Steel* answered he did, as he had had considerable acquaintance with him, and he, *Lewis*, had never falsified his word to him, and that he, *Watrous*, had concerning the brick house. *Watrous* then charged *Steel* with falsehood. *Steel* then told him not to repeat it again in the store. He, *Watrous*, then repeated it, and *Steel* told him to go out: *Watrous* refused; and *Steel* took hold of *Watrous*' cloak which was over him."

It appeared further from the deposition, that Mr. Hill, on being further interrogated and cross-examined, said he had, some time before the affray, given *Watrous* liberty to call at the store, and read the news-papers; that a circulating library was kept there, and *Watrous* was a subscriber to it; that he, the witness, and *Steel* were partners in the printing and book-selling business; that *Steel* had the charge of the book-store generally, and it was his duty to keep order there, and transact the business of the company. Edward Lamb testified that at the time of the alleged trespass the plaintiff was sick and declining with a consumption.

On the part of the defendant, Francis Clark testified, that the plaintiff came into the book-store and sat down, while the defendant was reading newspapers;—that the defendant spoke to the plaintiff, and said he had found a piece that applied to his and *Lewis*'s case;—that the plaintiff, being asleep, did not hear him, and the defendant spoke again, and the plaintiff said he should like to hear the piece read; and, after hearing it, asked the defendant if he thought it applied to his case;—that the defendant said he did; that he had heard *Lewis*'s story, and would believe him, for he had never falsified his word to him as the plaintiff had;—



that the plaintiff asked wherein he had falsified his word, and the defendant said as to the brick house ; on which the plaintiff said it was false ;—that they then contradicted each other, and the defendant told the plaintiff he should leave the store.

WASHINGTON  
March,  
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Steel.

The court directed the jury, amongst other things, that if the plaintiff was in the book-store making a noise or disturbance, the defendant, after requesting him to depart, might lawfully use all necessary force, short of actual striking, to put him out ; but although the defendant had such right, yet as the plaintiff entered the store by license, if the jury found that he was conducting himself peaceably and making no disturbance there, and that the defendant was the aggressor, and used insulting language to the plaintiff to irritate and provoke him, they would inquire—although the defendant requested him to leave the store, and he refused—whether the assault was made upon the plaintiff to remove him from the store and in defence of his possession, or whether it was done without such intent, and the occasion was sought by the defendant to lay hands upon the plaintiff for the purpose of injuring and abusing him. If they found that the assault was committed for the former cause, they would return a verdict for the defendant ; if for the latter purpose, the defendant's plea of justification was not supported ; and they would find such damages for the plaintiff as they thought he deserved to have. The jury returned a verdict for the plaintiff.

The defendant having filed exceptions, the cause was ordered to pass to the Supreme Court.

TURNER, J., delivered the opinion of the Court.—The jury have found the facts in this case under the directions of the court, and we are now to inquire whether those directions were in accordance with the principles of law relating to the subject. If the charge was not according to law, the verdict must be set aside, and a new trial granted : but if the charge was right, the judgement must be affirmed ; for we cannot interfere with the facts found by the jury.

The case states that the plaintiff entered the book-store with the permission or license of the legal owner, and that the defendant made an assault on him. The defendant justifies on the ground that he had a right to occupy and control the store in common with the owner, and that the plaintiff was abusing the privilege which had been granted him. It is a well settled principle, that the occupant of any house, store, or other building, has a legal right

WASHINGTON to control it, and to admit whom he pleases to enter and remain  
March, there ; and that he has also a right to expel any one from the room  
1829. or building who abuses the privilege which has been thus given  
Watrous him ; and if the occupant finds it necessary, in the exercise of his  
vs. lawful rights, to lay hands on him to expel him, he can legally  
Steel. justify the assault. But no man can invite or permit another to  
enter his dwelling for the purpose of abusing or assaulting him ; and  
if a person enter lawfully, the owner or occupier is not permitted  
to irritate or insult him for the purpose of having an occasion to  
abuse him, or as an excuse for assaulting him : in either case his  
plea of justification will be unavailing. It is a correct maxim,  
that no man shall take advantage of his own wrong. We are sat-  
isfied that the charge of the county court was right ; that is, if the  
defendant irritated and abused the plaintiff in his language for the  
sake of having an affray with him, the defendant's plea of justifi-  
cation is unavailing ; otherwise, the plea is sufficient.

Judgement affirmed.

*Merrill & Upham*, for plaintiff.

*Smith & Peck*, for defendant.

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**A**

**ABATEMENT.**

See **PARTNERSHIP**, 1.

**ACCOUNT.**

1. Where, in an action of *account*, it appeared the defendant, as the agent of the plaintiff, had taken notes payable to himself, for the benefit of the plaintiff, payable on a certain day at a particular bank, which notes had been accordingly paid by the maker at the time and place appointed, after the commencement of the action,—it was held that such payment was a payment to the defendant, and that he was accountable to the plaintiff for the amount of the notes—a demand having been made on the defendant to account for the notes before the suit was commenced, and he having refused so to do.—*Smith vs. Woods.* 400

2. In such case an endorsement of the notes by the defendant to the plaintiff, and a delivery of them to the auditor, at the time of the trial, will not be considered an accounting which will discharge the defendant from his liability. *Ib.*

See **TENANTS IN COMMON**, 1, 2.

**ACCOUNTABILITY.**

Where one received a bill of sale of certain articles of personal property, and was thereby authorized to take possession of them whenever he chose, and account for them to the owner at what they might bring at auction,—it was held, that he was accountable for those only of which he had taken possession, and not even for those, unless he had so conducted as to manifest an intention to make them his own, or had made them his own by such gross negligence as ought to make him accountable for their value.—*Durkee vs. Leland.* 612

**ACQUIESCENCE.**

The location of a lot of land to a public right may be established by acquiescence, as well as to any other right.—*Hall's admr. vs. Coventry.* 295

**ADMINISTRATORS.**

1. An administrator will be allowed his ac-  
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count for expenditures in a law suit, in which he fails to recover, when he acts in good faith, and with reasonable prudence; but he may press on a suit with so little prudence, and so little prospect of recovery, that he ought not to be allowed his costs.—*Eame's admr. vs. Creditors.* 257

2. An administrator should be charged with interest on monies he receives for the estate, during the time of any delay of a settlement of the estate, or when he can fairly be presumed to have used the money, or had safe opportunities to have kept the same on interest. *Ib.*

3. The principal administration being in this state, and the same person being also administrator in New-Hampshire, and not having closed his administration there for a long time, shall be held accountable here, in the first instance, for monies he received in New-Hampshire before he took administration there, and also, for monies received afterwards, for property which he had not inventoried there, and for which monies he had rendered no account there. *Ib.*

4. An administrator is to be charged with a loss in the sale of real estate, which he might have saved by prudent management; especially when he was interested in the last bid and purchase. *Ib.*

See **PROBATE REGISTER.**  
**EXECUTION**, 17.

**AGENT.**

B and S, being joint owners of a raft of timber, employed an agent to sell the same for their joint benefit;—It was holden, that the agent was a competent witness for S to prove that B, without the consent of S, directed the agent to apply the whole proceeds of the timber to the payment of debts owing from B to the agent, and that he, the agent, had accordingly so made the application.—*Spencer vs. Barnum.* 299

See **ACCOUNT**, 1.

**POOR DEBTORS**, 1, 2, 3.

**AGREEMENT.**

See **CONTRACT**.

**APPEAL.**

1. Where one sues before a justice of the

peace, in an action on *book account*, and sets his *ad damnum* at ten dollars only, and yet exhibits an account against the defendant of \$10.67, and recovers the ten dollars demanded, the action is appealable.—*Church vs. Vandusee*. 195.

2. The plaintiff cannot take away a jurisdiction, given in his writ, nor take away the right of appeal, by exhibiting a less account, than his writ would authorize, nor by setting his *ad damnum* lower, than the *debit* side of his account. *Ib.*

See ARBITRATION.

#### ARBITRATION.

A submission of an action to arbitrators, after an appeal therein, does not necessarily deprive the plaintiff of his right to enter his complaint for affirmance, unless there is an award made before court, or unless the terms of the submission allow a time, in which to make an award, which extends beyond the term of the court to which the appeal is taken.—*Hayes vs. Blanchard*. 210

#### ASSAULT AND BATTERY.

1. When one enters a store or other place of public resort, the owner or occupier, after requesting him to depart, may lawfully use all necessary force, short of actual striking, to put him out.—*Watrous vs. Steel*. 629

2. But where W entered a book-store with license from the owner, and conducted himself peaceably, and S, who was a partner of the owner, and had a right to the possession in common with him, seeking for an occasion to lay hands on W, for the purpose of injuring and abusing him, used insulting language to irritate and provoke him, and requested W to leave the store, and W refusing to depart, S assaulted him and forced him towards the door,—it was held that S was liable in trespass for the assault. *Ib.*

#### ASSUMPSIT.

See TOWNS, 1.

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#### ATTACHMENT.

1. When property is attached on *mesne process*, the delivery of the execution to the officer who made the attachment within thirty days from the rendition of the judgement, is a taking of the property in execution within the meaning of the statute, so far as respects the support of the lien of the creditor.—*Bliss vs. Stevens*. 88

2. When property is attached by a sheriff's deputy, the delivery of the execution, within the thirty days, to another deputy of the same

sheriff, and informing the latter deputy of the attachment, equally supports the creditor's lien; the act of each deputy being, in a civil point of view, the acts of the sheriff himself. *Ib.*

3. When the creditor's lien is kept good, by delivering the execution to the officer within thirty days, a demand of the property of the receptors, after the first thirty days, and in the life of the execution, is sufficient to charge them. *Ib.*

4. The production of an execution in such cases may be dispensed with by proof of its loss. *Ib.*

5. Where an officer was commanded in a writ to attach the goods and chattels of a defendant to the value of twenty dollars, and afterwards he made his return on the writ that he had, by the directions of the plaintiff, attached all the hay, grain, oats and peas in the defendant's barn,—it was held that he was estopped from saying there was no such property there, and that the command in the writ and return thereon were *prima facie* evidence that the property attached was worth twenty dollars.—*Barney vs. Weeks*. 146

6. A creditor having caused certain personal property to be attached by virtue of a writ of attachment against his debtor, afterwards took out an execution on the judgement rendered in said suit, and in due season delivered it to the sheriff who made the attachment, with directions to levy it on the property attached, and the sheriff without the consent of the creditor, delivered the execution to a constable, who made a return thereon, *that he had repaired to the dwelling house of the debtor, demanded the property, and could not find any whereon to levy the execution*,—it was held that the sheriff was liable. *Ib.*

7. If an officer, attaching goods in a building, lock up the building and take the key into his possession, it is a sufficient taking possession, as respects subsequent attachments; and if the officer fail to secure the property effectually, and the attorney or creditor, acting in his behalf, proceed to do so, before any subsequent attachment is made, his attachment is valid.—*Newton vs. Adams et al.* 437

8. Although the officer, by taking exclusive possession of the building and excluding the owner, might be regarded as a trespasser *ab initio*, as respects the owner, yet the attachment is valid. *Ib.*

9. An officer by the directions of the creditor's attorney attached certain personal property of a debtor by virtue of a writ of attachment, and delivered the same to a person, who executed his receipt therefor to the officer, promising to redeliver it on demand, and then permitted it to go back into the possession of the debtor. Afterwards the attorney took out a writ of attachment in his own favor, against said debtor, and gave it to the same officer, with directions to attach the same property; which was done accordingly. Judgement

having been rendered in this last suit, the property was sold on execution issuing thereon.—It was held in an action brought by the officer on the receipt, taken on the first attachment, to recover the value of the property, that the suit could not be sustained.—*Beach vs. Abbott et al.* 605

See TROVER, 3, 4.

RECEIPTORS, 1, 2.

TENANTS IN COMMON, 3.

#### ATTORNEY.

1. Where an attorney, without any license or authority, instituted a suit against A in favor of B, and judgement was rendered therein for the defendant to recover his costs.—it was held, in an action brought by A against B on said judgement, that B was bound thereby, and could not plead the want of authority in the attorney.—*St. Albans vs. Bush.* 58

2. An attorney on the trial of a cause is not obliged to produce a paper which his client has entrusted to him as counsel in the case, and in professional confidence.—*Durkee vs. Leland.* 612

See EXECUTION, 3.

POOR DEBTORS, 2, 3.

#### AUDITA QUERELA.

The complainant in an *audita querela* will not be permitted to prove any cause for setting aside an execution or a judgement, other than such as are set up in his complaint.—*Hayes vs. Blanchard.* 210.

See RECOGNISANCE, 1.

#### AUDITORS.

1. When a report of auditors is set aside, and the cause again referred to them, they must go into an examination of the whole case, if requested, and make their report accordingly.—*May et al. vs. Corleir.* 12

2. Auditors having made and signed a report may afterwards make an additional statement explanatory of their views in the case. *Ib.*

3. They may report in the alternative, leaving it to the court to render judgement for one of two sums according as the court should judge the law to be. *Ib.*

See BOOK ACCOUNT.

### B

#### BAR, PLEA IN

See JUDGEMENT, 1, 2.

#### BASTARDY.

In a case of bastardy, where the mother seeks support for her child of the reputed father,

and is herself a witness, testimony is not admissible to show, that she was reputed to be a common prostitute before the child was begotten. If this affects her truth, the defendant has the full benefit of it under the general enquiry concerning her character for truth.—*Morse vs. Pineo.* 281

#### BETTERMENTS.

1. H having contracted to purchase a lot of land of S, executed his notes to S for the amount of the purchase money, and S obligated himself by bond to convey the land to H on the payment of the notes. H entered and took possession of the land, but did not pay the notes; and consequently S did not execute a deed of the premises to H. After H had remained in possession of the land several years he sold his interest therein to D, who, two or three years after, sold and conveyed his interest in the land to B. S having afterwards recovered a judgement against B in an action of ejectment for the seizin and possession of the premises, B filed a declaration for betterments under the statute; and it was held, that B might recover for all the betterments made by himself, and for those made by D, his grantor, provided D, at the time he purchased of H, supposed he purchased a title in fee, and did not purchase H's right merely, under the contract made with S; and that B could not recover for any improvements made by H, there being no failure on the part of S to fulfil the contract.—*Brown vs. Storm.* 37

2. No recovery can be had in a declaration for betterments founded on an alleged want of title in the defendant, (the recovering party in ejectment.) *Ib.*

3. The statute which authorizes the defendant in ejectment to file a declaration for betterments, is not unconstitutional. *Ib.*

#### BILL OF SALE.

See ACCOUNTABILITY.

#### BOND.

1. Where the condition of a bond was, that the obligors should pay and discharge a certain mortgage deed, executed by the obligee to a third person, conditioned for the payment of certain promissory notes also executed by the obligee,—it was held in an action brought by the obligee, for the breach of the condition, that it was not necessary for him to produce the notes on trial; and that the bond sufficiently described the notes, though it did not mention the time when they were payable, and described them as being signed by the obligee, when they were in fact signed by him and another person.—*Everts vs. Bostwick et al.* 349

2. In such case the plaintiff may recover,

though the non-payment of a note is set up as a breach of the condition, which is not mentioned in the mortgage deed—the mortgage itself not being referred to as a part of the contract, and the bond providing for the payment of the note, and declaring it to be one of the notes secured by the mortgage. *Ib.*

### BOOK ACCOUNT.

A party to an action on *book account* may testify, before auditors, to a settlement, or to payments and items in his account, from which a settlement may be inferred.—*May et al vs. Corlew.* 12

See AUDITORS.

FEME COVERT, 1.

PARTNERSHIP, 1.

JURISDICTION, 4.

APPEAL, 1, 2.

### BRIDGES.

See TOWNS, 1, 2, 3, 4.

## C

### CASE, ACTION OF

D undertook to remove certain boxes of lumber down a river and deposit them safely in a certain cove; but being prevented by the owner of the cove from depositing them there, he left them in an eddy immediately below the cove, in as safe a place as could be found, fastened by a rope, and paid no further attention to them. The water in the river afterwards arose, in consequence of which the lumber was carried away and lost. It was held, in an action brought by the owner against D, to recover for the lumber so lost, that it was not only the duty of the defendant, under the circumstances of the case, to place the lumber in as safe a place as there was near to said cove, but also to continue a prudent care over the same, until he had given notice to the owner, and until the owner, after such notice, could resume the care and control thereof.—*Pickett vs. Downer.* 21

See DEED, 1.

### CERTIFICATE.

See TOWN-CLERK.

### CIRCUIT COURTS.

A Circuit Court of the United States is not a foreign court, nor a court of inferior jurisdiction, and *nil debet* is not a good plea to a judgment rendered by such court.—*St. Albans vs. Bush.* 58

### COLLECTOR OF TAXES.

See VENDUE DEED.

SCHOOL DISTRICT TAX.

### CONDITION.

See BOND, 1, 2.

### CONSTITUTION.

1. Partial payment of a debt due is no consideration for a promise to wait for the residue another year.—*Mason et al. vs. Peters.* 101

2. If there were a good consideration for such a promise, and the promise were binding, in order to bar an action of ejectment on a mortgage, it ought to be pleaded as a lease for a year. *Ib.*

3. Such promise made on good consideration might be the ground of an action to recover damages for the breach of it; but for nothing more. *Ib.*

4. The parties in a controversy having agreed in writing to submit it to the determination of arbitrators, two other persons not interested, promised in writing, *that, in consideration of said submission, they would pay whatever sum should be awarded against one of said parties*, it was held that the promise was without consideration, and not binding on the promissors.—*Barlow vs. Smith et al.* 139

5. Where the payee of a promissory note received from one of the signers an order on a third person for a portion of the note, which order, if accepted and paid, was agreed to be in full satisfaction of all claims against such signer on said note, and the payee was to look to the other signer alone for the residue,—it was held in an action afterwards brought by the payee against the signer from whom the order had been received, that the receiving the order, as above mentioned, was not a valid defence to the action, although the order were paid by the drawee, or he were prevented from paying it by the misconduct of the plaintiff.—*Wright vs. Allen.* 572

See CONTRACT, 1.

SURETY, 2, 3.

LOTTERIES, 1.

PROMISORY NOTES, 1, 2.

### CONSTITUTIONAL LAW.

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See BETTERMENTS, 3.

EQUITY, 1.

SHERIFF, 4.



CONSTRUCTION.

Where one conveyed a piece of land on which there was a large quantity of free-stone, disconnected from any fixed ledge, and partly imbedded in the earth, and by the deed reserved all the free-stones on said land to himself, his heirs and assigns, with the privilege of carrying off said stones,—it was held, that the reservation did not extend to a ledge of free-stone under ground, and not known to the parties at the time of the conveyance; and that parol evidence was admissible to show the situation and quantity of stones upon the surface at the time of the conveyance, and that the ledge under the surface was not then known to the parties.—*Pulnam vs. Smith*. 622  
See DEED, 2.

CONTRA FORMAM STATUTI.

Where an act is an offence at common law, and there is a statute prohibiting the same offence, and annexing a penalty or forfeiture, it is not necessary, in declaring for the penalty, to allege that the acts constituting the offence, were done against the form of the statute.—*Fuller vs. Fuller*. 123

CONTRACT.

1. L purchased a horse of O, and delivered him a note against a third person in part payment therefor. At the same time it was agreed by the parties, that if L did not within a certain time procure good security for the balance, he was to return the horse, and the note was to become the property of O. L having failed to procure the required security, he returned the horse, and demanded the note, which O declined delivering up at the time, but afterwards told L he might have the note if he, L, would come after it, but said he should sue L for damages. L afterwards again demanded the note, and O refusing to deliver it to him, L brought an action of assumpsit against O to recover the amount of the note; and it was held, that by the contract the note had legally become the property of O, and that the after promise to redeliver the note was made without consideration, and did not amount to a rescinding of the contract.—*Larabee vs. Ovit*. 45

2. M having contracted to perform a job of work by a specified time, for which he was to receive payment therefor when the job was done, applied to D, and stated to him the terms of the contract, and requested him, D, to furnish him from time to time with goods out of D's store, saying he wished D to wait for his pay until he had finished the job, and had received payment therefor. D assented, and let M have goods, from time to time, to a considerable amount. It was held that D was entitled to his pay for the goods so delivered, as

soon as the time had expired within which the job was to have been performed, though M had not completed it, nor received payment therefor.—*Dana vs. Mason*. 368

3. An agreement, made at the time of the sale of a farm, that the notes given for the purchase may be satisfied by paying an incumbrance on the farm, is binding on the party, and not revocable at pleasure.—*Joy vs. Hull*. 455

See CONSIDERATION, 4, 5.

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LIMITATION OF ACTIONS, 3, 4, 5.

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See JURISDICTION, 1, 2, 3, 4.

COVENANT.

1. One cannot, merely by entering into possession of land, and claiming it as his own, avail himself of the covenants in a deed of conveyance of the premises previously executed by the covenantor to an intervenient possessor.—*Beardsley vs. Knight*. 471

2. Where one sues for a breach of covenants running with the land, he must prove a legal assignment to himself, by the covenantor or his assignee, by deed of warranty, having all the requisites of a deed of conveyance; and on failing to prove such assignment or conveyance, all other evidence is irrelevant, and must be rejected. *Ib.*

See LIMITATION OF ACTIONS, 7, 8.

FEME COVERT, 4.

COVERTURE.

If a feme sole plaintiff marry pending a suit, and no proceeding is had under the statute with regard to the marriage, and the defendant does not plead the coverture in abatement, but suffers a default in the action, he cannot afterwards avoid the judgement by writ of error.—*Bates vs. Stevens*. 545

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D

DAMAGES.

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PAYMENT, 1.

DEBT.

1. Where a claim is wholly founded upon a matter of record, and exists only as a matter



of record, the action to recover it must be debt and not assumpsit.—*Wood's admr. vs. Pettis.*

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2. Assumpsit will not lie to recover a sum found due by the commissioners appointed to examine and adjust the claims against an insolvent estate.

*Ib.*

See DECLARATION, 1.

#### DECLARATION.

1. In debt on a judgement recovered by an executor in his representative capacity, it is not necessary that the plaintiff should describe himself as executor.—*Adams vs. Campbell.*

447

2. The omission of the *debet* and *detinet* in such a case, in the declaration, is a ground of special demurrer.

*Ib.*

See PLEADING, 3, 4.

#### DEED.

1. The receiving a deed of a lot of land and taking actual possession under it, vests in the grantee a sufficient title to enable him to maintain an action on the case for the flowing of the land by one who has no right to flow it.—*Hull vs. Fuller.*

199

2. A deed describing a boundary line of land as running up a river to certain falls, "thence continuing to run in such a direction as to include a mill yard and the whole of a mill pond, which may be raised by a dam on said falls to a certain road," determines the boundary of the land itself, and not the height to which the pond may be raised.

*Ib.*

3. Where a deed is executed by the grantor with intent to avoid any right, debt or duty of others, and the grantee knows of such intention, at the time of receiving the deed, such deed is void, though the grantee have no wish to defraud creditors, and pays an adequate consideration for the property.—*Edgell vs. Lowell.*

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4. A deed absolute on the face of it, if intended as a security to indemnify the grantee for becoming bail for the grantor, or for an existing debt, is not on that account void, though the design of the parties does not appear upon the deed, nor by any evidence in writing.—*Gibson vs. Seymour.*

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See VENDUE DEED.

Town-Clerk.

CONSTRUCTION.

#### DEFENDANT.

1. One cannot be legally made a defendant in a suit at law, unless he be served with process in some way provided by statute.—*Society vs. Ballard.*

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2. Where a landlord in ejectment resided out

of the state, and a writ, sued out against him having been returned *non est inventus*, the court directed notice of the pendency of the suit given by publication in a newspaper, and he subsequently appeared and answered to the action,—it was decided that he be dismissed therefrom with cost.

*Ib.*

3. Certain defendants in an action of ejectment residing in another state at the time the suit was commenced, no service was made on them by attachment or otherwise, and they not having had notice of its pendency, the court ordered notice to be given by publication in a newspaper, agreeably to the requisitions of the statute respecting persons absent from the state, at the time a suit is commenced against them, and have no notice of it;—the defendants not appearing in pursuance of said notice, judgement was rendered against them by default. On a writ of review afterwards brought by these defendants, it was held, that the judgement was void for want of jurisdiction of the court; and that they had no occasion to bring a writ of review in order to avoid the judgement.—*Skinner et al vs. McDaniels.*

418

4. If neither person nor property of one against whom a suit is brought, can be found in this state whereon to serve process, the court has no jurisdiction over him.

*Ib.*

See EXECUTION.

#### DEMAND.

See PRESUMPTION, 1, 2.

LIMITATION OF ACTIONS, 10, 11, 13.

ATTACHMENT, 3.

#### DEPOSITION.

See JUSTICE OF THE PEACE, 1.

#### DEVISE.

See PAROL EVIDENCE, 1, 2.

#### DISCHARGE.

1. V and H. executed a joint and several note to G. Judgement having been obtained on the note against V, he was committed to jail on the execution, gave a jail bond, and was admitted to the prison liberties. G afterwards received from V, a part of the debt, and in consideration thereof, discharged the bond. It was held in an action brought against H, the other maker of the note, that the discharge of the bond was a full and complete discharge of the whole debt, and consequently of H, the other signer.—*Hyde vs. Long.*

531

2. Where the payees of a promissory note, without the request of the surety, commenced a suit thereon, and attached the property of the principal, and afterwards, by an arrangement made with the principal, dissolved the attachment and discontinued the suit,—it was held in an action brought against the surety

on said note that he was not released from his liability thereon.--*Montpelier Bank vs. Dixon.* 587

See RELEASE,  
CONSIDERATION, 5.

DISCRETION, JUDICIAL.  
See JURISDICTION, 7.

## E

### EJECTMENT.

1. The plaintiff in ejectment cannot recover damages for rents and profits, unless he recovers the land sued for; then the damages follow by force of the statute.--*Burton vs. Austin et al.* 105

2. The plaintiff, in such case, must have title, as against the defendant, both when his action is commenced, and when it is tried. *Ib.*

3. Ejectment by mortgagee, commenced after a decree of foreclosure, is defeated by mortgagor's paying the amount of decree, which destroys the title of the mortgagee. *Ib.*

4. A defendant in ejectment, who does not derive his possession from the plaintiff, but claims adversely, may, at any time before trial, purchase in an outstanding title to protect his possession.--*Tucker's exrs. vs. Keeler et al.* 161

5. A plaintiff in ejectment must show the defendant in actual possession of the premises demanded at the time the suit was commenced, or he cannot recover.--*Skinner et al vs. McDaniel.* 418

6. Where the plaintiff in ejectment claims the premises by virtue of the levy of an execution, and the defendant is a stranger to the title, and does not claim under the execution debtor, he will not be permitted to call in question the correctness of the judgement and execution, by virtue of which the plaintiff claims title.--*Phelps vs. Parks.* 483

See DEFENDANT, 2.

WITNESS, 2, 3, 4.

POSSESSION, 1, 2, 3, 4.

### ENDORSEMENT.

See PENCIL.

PROMISORY NOTES, 3.

### EQUITY.

A petitioner has no claim in law, or equity, or by any analogy to the principles of law or equity, against the state, for monies he has been compelled to pay in consequence of being bail for one, who obtained an act of suspension, and departed from the liberties of the prison, and the act of suspension has been adjudged to be unconstitutional.--*Davison vs. State.* 235

### ERROR.

1. When a defendant is out of the state at the time of the service of the writ, the judgement of the court, before which the suit is brought, is conclusive as to the sufficiency of the evidence of notice to him of the pendency of the action, and cannot be re-examined on a writ of error.--*Olcott vs. Hutchins et al.* 17

2. When notice is proved, in such case, to the satisfaction of the court, and the defendant does not appear, he cannot afterwards, by writ of error, take advantage of any defect or irregularity of service. *Ib.*

3. It is erroneous for the county court to decide on a matter of fact, without an issue properly joined, showing an agreement of parties to have the issue tried by the court.--*Sherrin et al. vs. Bliss.* 96

See COVERTURE, 1.

### ESCAPE.

In an action on the case against a sheriff for an escape, such sheriff has a right, at common law, to show the property of the prisoner at the time of the escape, in mitigation of damages.--*Treasurer vs. Weeks.* 215

### ESTOPPEL.

See JAIL BOND, 2.

PLEADING, 5.

### EVIDENCE.

1. When a person is living, and is an admissible witness, his declarations, not made under oath, cannot be received in evidence.--*Warner et al. vs. McGary.* 507

2. Where one sold a note warranting that the maker had nothing which could be pleaded in offset thereto, and the purchaser sued the note, and was prevented from recovering by an offset pleaded and allowed;--it was held, in an action brought by the vendee of the note against the vendor, to recover for a fraudulent representation with regard to the offset, that the prior judgement on the note was conclusive evidence of the existence of the claims allowed in offset; the vendor having been present at the trial on the note, and assisted the plaintiff in sustaining the action.--*Walker vs. Ferrin.* 523

See ATTACHMENT, 5, 6.

PROBATE REGISTER.

PROMISORY NOTE, 5.

JUDGEMENT, 3.

### EXCEPTIONS.

See TRUSTEE ACTIONS, 1, 2, 3:

### EXECUTION.

1. The necessary intendment, in an officer's

return on an execution of an appraisal of land at its *true value in money*, is the true value at the time of such appraisal.—*Dodge vs. Prince et al.* 191

2. The officer making demand of payment at the house of the debtor, when he is absent from the state, is sufficient to authorize a levy of an execution on land. *Ib.*

3. The attorney, whose name is certified on an execution, as attorney of the party, is such for the purpose of prosecuting or defending the suit and receiving pay, but not for the purpose of appointing appraisers, unless he has a special appointment for that purpose. *Ib.*

4. The officer, in returning that the appraisers were appointed by a justice of the peace, must state that he was one, who by law might judge between the parties in civil causes, unless he adopts the generality of an ancient approved form. *Ib.*

5. When an execution is levied on land, the record in the town clerk's office may be made from a copy of such execution, and officer's return thereon; and such record will be sufficient, if it substantially agree with the original.—*Skinner vs. Watson.* 421

6. If there be an error or mistake in recording the levy of an execution, which does not tend to the injury of any person, and the record is sufficient to answer all the purposes for which it was made, the levy is not thereby void. *Ib.*

7. Where a judgement was rendered in a suit against the defendant who was out of the state at the time the suit was commenced, and had not received notice of it, except by publication in a newspaper, and the plaintiff, after entering into a recognizance in double the sum recovered in damages, without including the costs, took out an execution, and levied it on the lands of the judgement debtor,—it was held that the execution was not void, and that the plaintiff acquired a valid title to the land by the levy.—*Phelps vs. Parks.* 488

8. Title acquired by levy of an execution is not rendered invalid by reason of any irregularity or erroneous decision of the court in rendering the judgement on which the execution issued. The judgement is sufficient until set aside or reversed in some of the ways which the law has provided.—*Eastman vs. Curtis.* 616

9. It is not necessary for an officer, levying an execution on real estate, to state in his return that he has demanded the money, &c., nor that the debtor neglected to pay it, or to exhibit personal property: these preliminary duties are not essential to pass the title. *Ib.*

10. Where an officer extends an execution on personal property, when the amount of the execution is offered to him, or upon real estate, when the debtor exposes sufficient personal property, he will be liable to any one who is aggrieved thereby. *Sed dubitatur*, whether such a misfeasance of the officer would affect

the title to property acquired by virtue of the levy. *Ib.*

11. When an officer's return on an execution extended on land, is conformable to forms which have been long in use, it is sufficient, though it contains some technical defects. *Ib.*

12. Where an officer stated in his return that the land extended on had been appraised by persons *mutually appointed by the parties*,—it was held to be a strict compliance with the statute. *Ib.*

13. Where an error is committed by an officer in his return in writing an important word, yet, if nothing can be intended by it but the word required by law, the return is sufficient. *Ib.*

14. It is not a valid objection to a title acquired by levy of an execution, that it does not appear from the return the land was shown to the appraisers, nor that they made the appraisal in view of the premises, nor what means they took to ascertain the value. *Ib.*

15. Where an officer stated in his return that he had sworn the appraisers as the law directs, without otherwise saying what oath he administered to them, the return was held to be sufficient. *Ib.*

16. If an officer charges more than legal fees for levying an execution, the title to property acquired by such levy is not thereby affected. *Ib.*

17. Where judgement was recovered by an administrator, on which execution was issued and extended on real estate, and the return of the officer was in the common form, not designating whether the land was set off to the administrator or heirs,—it was held to be sufficient. *Ib.*

See ATTACHMENT, 1, 2, 3, 4, 6.

EJECTMENT, 6.

RETURN, 1, 2, 3, 4, 7, 8, 9.

WITNESS, 2, 3.

MONEY.

SHERIFF, 2, 3.

#### EXECUTORS.

See ADMINISTRATORS.

DECLARATION, 1.

PAROL EVIDENCE, 1, 2.

#### EXEMPTION FROM ATTACHMENT.

1. A horse and saddle, owned by a member of a company of cavalry, are not exempt by the militia laws of the state from attachment or execution.—*Fry vs. Canfield.* 9

2. A person's only cow is not subject to attachment or execution, though he reside in Canada, and the cow be casually found in this state.—*Haskill vs. Andros.* 609

#### EXTENT.

See TREASURER'S EXTENT.

# F

## FEME COVERT.

1. In an action on *book account*, though each party is made a witness by statute, that provision does not extend to the wife of either; nor can she be admitted to testify.—*Carr vs. Cornell*. 116

2. Where on the sale of property belonging to a *feme covert*, a promissory note was executed to her and her husband, during coverture, for the purchase money,—it was held that said note survived to the wife on the death of the husband, and that she, and not the administrator, had the right to endorse it.—*Richardson vs. Daggett*. 336

3. A lease for 800 years to a *feme covert* and her particular heirs, such, too, as were then in being, is an incumbrance on the estate.—*Sawyer vs. Little*. 414

4. When husband and wife join in a deed of conveyance of land, with covenants of seizin, &c., the wife is not liable to a suit upon such covenants, but the husband, it seems, may be sued as if it were his sole deed. *Ib.*

5. Where a *warning-out process* was issued directing the constable of a town to summon a man and his wife to depart said town, to prevent their gaining a legal settlement therein,—it was held that no service need be made on the wife, and that if the service was sufficient to prevent the husband from gaining a settlement, it, of course, prevented her.—*Barnet vs. Concord*. 564

## FORECLOSURE.

See EJECTMENT, 3.  
MORTGAGE, 1.

## FOREIGN JUDGEMENT.

See CIRCUIT COURTS.

## FORFEITURE.

See CONTRACT.

## FORMER RECOVERY.

See JUDGEMENT, 1, 2.  
TRESPASS, 1, 2.

## FRAUDULENT CONVEYANCES.

1. Where, in an action on the statute to prevent fraudulent and deceitful conveyances, the declaration alleged that one E. S. owned and possessed certain lands and tenements, and goods and chattels, to wit, [describing the land,] together with the carding machines, picking machines and clothier's tools, in and upon the premises, subject to a mortgage incumbrance, alleging that the whole property was of a certain value,—it was held, that the declaration, though defective for not expressly averring, that there

were carding machines, &c., in and upon the premises, and the value thereof separate from the land, and the amount of the incumbrance, was nevertheless good after verdict.—*Fuller vs. Fuller*. 123

2. In such case it is not necessary to aver that the personal property, alleged to have been fraudulently conveyed, had been delivered to the defendant; as the conveyance would be fraudulent, within the meaning of the statute, without a delivery. *Ib.*

3. The declaration in such case need not conclude *contra formam statuti*. *Ib.*

See VOLUNTARY CONVEYANCE.

WITNESS, 1.

DEED, 3, 4.

VENDOR & VENDEE, 1, 2.

# G

## GRANTOR AND GRANTEE.

A having given a deed of warranty of land; and afterwards having put a third person in possession of the same land, should be considered as having done this in behalf of his grantee, or as his agent; at least, he may be presumed to have so done.—*Warner's admr. vs. Page*. 291

## GUARDIAN AD LITEM.

See RELEASE, 4.

# H

## HUSBAND AND WIFE.

See FEME COVERT.

# I

## INCUMBRANCE.

See FEME COVERT, 3.

## INFANT.

1. A, an infant, contracted to labor for W one month for fifteen dollars, five of which were to be paid in cash, and the remainder in cloth. A having performed the stipulated service, W paid him the five dollars in money, and gave him an order on a third person for the cloth.—It was held that A was not bound by the receipt of the order, but might avoid the contract, and recover on a *quantum meruit* for work and labor such sum as his services were worth, deducting the five dollars.—*Abell vs. Warner*. 149

2. All contracts of an infant, whether executed or not, if not for necessities, may be avoided by him, unless he has confirmed them after arriving at full age. *Ib.*

See RELEASE, 2, 3, 4, 5.

**J****JAIL BOND.**

1. A declaration on a jail bond is bad, if it shows that the judgement, upon which execution issued, was not correctly described in the bond.—*Sherwin et al. vs. Bliss.* 96

2. A defendant, in a suit upon a prison bond, is not, by the recital in such bond of the rendition of a judgement, and the issuing of execution, &c., estopped from pleading *null tiel record* of such judgement.—*Stillman et al. vs. Barney.* 187

**JAIL COMMISSIONERS.**

See **POOR DEBTORS.**

**JOINT & SEVERAL OBLIGORS.**

See **DISCHARGE, 1.**

**JUDGEMENT.**

1. Where judgement had been rendered in a suit, *that the plaintiff from having and maintaining his action should be barred, and that the defendant recover his cost*,—it was held to be a judgement on the merits of the action, and a bar to any future action brought for the same cause.—*Dixon vs. Sinclair.* 354

2. A judgement was rendered for the plaintiff by the mutual agreement of the parties, subject to the award of arbitrators upon certain claims pleaded in offset; and the arbitrators failing to make any award, the plaintiff brought an action of debt on the judgement. The defendant pleaded that the judgement had been rendered on the condition above mentioned, and that he was willing and ready to proceed with the arbitration, but that the plaintiff refused. The plaintiff replied, admitting the agreement, but denied that the defendant was ready and willing to proceed with the arbitration, and alleged that he had refused so to do, though requested. Upon this, a *sue was* joined, and found for the defendant; and judgement was rendered accordingly. The plaintiff afterwards brought another action on the original judgement; and the defendant pleaded in bar the former judgement of the court in his favor. The plaintiff replied, setting forth the foregoing facts, and insisted that the judgement which had been rendered in the former action, was not rendered on the merits. It was held on demurrer to this replication, that the defence relied on in the former action was of a permanent character, and that the replication was insufficient in law, to obviate the legal effect of the plea. *Ib.*

3. An exemplified copy of a judgement is the legal and proper evidence to prove the same: neither docket minutes nor records

should be received, unless there be very strong reasons for dispensing with the usual and appropriate evidence; as where the judgement has not been recorded.—*Lowry vs. Cady.* 504  
See **TROVER, 2.**

**DEFENDANT, 3.**

**JURISDICTION.**

1. The county court ought not to dismiss an action for want of jurisdiction, where there are several counts in the declaration, and the damages are uncertain, though such court may be of opinion that the plaintiff ought to recover less than one hundred dollars.—*Ladd vs. Hill.* 164

2. In such a case, the motion is addressed to the sound discretion of the court, and ought not to prevail, unless the court are satisfied, that all which is sought in the declaration might be so presented, that the merits could surely be tried in one action before a justice of the peace. *Ib.*

3. The jurisdiction of the county court cannot be affected by testimony of the defendant, calculated to lower the damages. *Ib.*

4. The county court should dismiss a suit for want of jurisdiction, where the sum declared for, as a balance on book, and the *ad damnum*, are each one hundred dollars, and no more.—*Bates vs. Downer.* 178

5. The plaintiff's writ must show, that the court, to which he applies, has jurisdiction of his action: at least the contrary must not appear. *Ib.*

6. The plaintiff's testimony must also show his case within the jurisdiction of the court, to which he brings his action. *Ib.*

7. A motion to dismiss an action, originally commenced before the county court, on the ground, that the plaintiff's proof does not entitle him to recover over one hundred dollars, is a motion addressed to the discretion of the Court, and ought not to be granted, unless it be clear, that the plaintiff has no fair pretext for claiming over one hundred dollars.—*Morrison vs. Moore.* 264

See **APPEAL, 1, 2.**

**DEFENDANT, 4.**

**JURORS.**

See **NEW TRIAL, 7.**

**JUSTICE OF THE PEACE.**

A justice of the peace may adjourn the taking of a deposition; and verbal notice given to the adverse party of the adjournment, is sufficient.—*Edgell vs. Lowell et al.* 405  
See **SET OFF, 2.**

**JUSTIFICATION.**

See **ASSAULT & BATTERY.**

# L

## LACHES.

See PROMISSORY NOTES, 3.

## LANDLORD AND TENANT.

See DEFENDANT, 1, 2.  
POSSESSION, 6.

## LAW QUESTION.

See SEAL, 1.

## LEGISLATURE.

A declaration, alleging a tax granted by the legislature, is well enough; that term being used in some sections of the constitution.—*Treasurer vs. Weeks.* 215.

## LEVY OF EXECUTION.

See EXECUTION, *passim*.

## LIEN.

1. The accepting of a negotiable promissory note in payment of an account for labor bestowed on any article, is such a manifestation of the intention of the party taking the note to rely on the personal security of the maker of the note, as to be a waiver of any lien which he might have had on the article on which the labor was bestowed, whether such note be payable on demand, or at a future time, and whether negotiated or not.—*Hutchins et al. vs. Olcott.* 549

2. The taking such a note is of itself a waiver of any lien which the law gives as a charge on the property on which the labor is bestowed. *Ib.*

3. In such case the lien does not attach to the note and follow it into the hands of any one to whom it may be negotiated, and does not attach to it even in the hands of the payee. *Ib.*

## LIMITATION OF ACTIONS.

1. The statute of limitations bars claims in equity as well as those at law.—*Stanford vs. Tuttle.* 82

2. Where a demand is necessary to perfect a claim, the statute only runs from a demand made. *Ib.*

3. A promise to pay certain notes, signed by the promisee and another, is broken when those notes become payable; and the statute of limitations then begins to run.—*Crofoot vs. Moore.* 204

4. Such a contract is not a contract of indemnity, but an action will lie upon it as soon as the pay-day arrives, without payment by the promissor. *Ib.*

5. In such a case, the common counts will not aid the plaintiff to avoid the statute of limitations. *Ib.*

6. The statute of limitations does not run against the state, unless named in direct terms.—*Treasurer vs. Weeks.* 215

7. An action upon a covenant of seizin is barred by the statute in eight years from the execution of the deed, which contains such covenant.—*Pierce vs. Johnson.* 247

8. Such covenant of seizin is, in a sense, a covenant to secure the title of land; yet the section of the statute which bars only in ten years after a decision against the title of the grantor, must be considered as referring to covenants of warranty, upon which no action will lie, till after eviction. *Ib.*

9. A possession for fifteen years by the defendant, adverse to the plaintiff, bars the plaintiff's action, whether the defendant claimed in his own right, or under the town.—*Hall's admr. vs. Coventry.* 295

10. There is no difference between a note payable "when demanded," and one payable on demand, and in both cases the statute of limitations begins to run from the date of the note.—*Kingsbury vs. Butler.* 458

11. When the statute of limitations is pleaded to an action on promissory note payable "when demanded," the plaintiff will not be allowed to prove the note had been lost for a time, in order to rebut the presumption that a demand had been made. *Ib.*

12. Where one by contract in writing had bound himself to convey certain lands which he had bid off at vendue,—it was held in a bill in chancery brought by the other contracting party to compel him to a specific performance, or to pay over what he had received on the sale of the lands, that the statute of limitations was a good plea.—*Collard's admr. vs. Tuttle.* 491

13. But in such case the statute does not begin to run till after a demand made; and after a great lapse of time it will be presumed that such demand has been made. *Ib.*

## LOCATION OF LANDS.

See ACQUIESCENCE.

## LOTTERIES.

1. The right of raising money by a lottery, once granted, but now of no legal force, is not a good consideration for a note.—*Rogers vs. Hough.* 172

2. Where a lottery act requires three managers, one alone cannot act legally, but his proceedings are void. *Ib.*

# M

## MALICIOUS PROSECUTION.

1. To constitute probable cause in such a



case, the facts and circumstances, on which the defendant proceeded, must have afforded him a reasonable ground to believe the plaintiff guilty of the offence charged. And statements made to the defendant by third persons, if they have an important bearing on the question of guilt, and appear to be entitled to credit, are to be reckoned among such facts and circumstances.—*French vs. Smith.* 383

2. In an action for malicious prosecution, the question of probable cause is sometimes wholly a question of law, but more frequently a mixed question of law and fact. *Ib.*

#### MONEY.

1. Money of a debtor in his possession may be taken on execution, if the officer can seize the same without a violation of the personal security of the debtor.—*Prentiss vs. Bliss.* 513

2. A sheriff who has collected money on an execution is not justified in applying it in satisfaction of another execution against the creditor in the former one. *Ib.*

3. Neither can money collected by an officer on execution be attached, while in his hands, as the property of the creditor in the execution. *Ib.*

#### MORTGAGE.

1. If a mortgagor remains in possession of the mortgaged premises after a decree of foreclosure and the expiration of the time for redemption, he is a tenant at sufferance to the mortgagee, or his assignee, and the statute of limitations will not run in his favor.—*Tucker's exr. vs. Keeler.* 161

2. If mortgagee, after condition broken, assign to B, and mortgagor cuts timber, and leaves it upon the premises till after B takes possession, the mortgagor cannot maintain trover against B for his using this timber.—*Johnson's admr. vs. McGuire.* 327

See EJECTMENT, 3.

BOND, 1, 2.

### N

#### NEGLECT.

See CASE, ACTION OF.

#### NEW TRIAL.

1. A party cannot complain of surprise, as a ground for a new trial, because a witness was introduced by the adverse party to prove what was directly put in issue by the pleadings.—*Dodge et al. vs. Kendall.* 31

2. When a witness, who had become recognised for the prosecution of the suit, is intro-

duced by the plaintiff, and is admitted without objection, the defendant will not afterwards be entitled to a new trial on the ground of the incompetency of the witness. The objection should be taken at the trial, when the witness can be rendered competent by substituting other bail, or be rejected. *Ib.*

3. A new trial will not be granted for new discovered evidence, unless such evidence make a clear case, and not be merely cumulative, leaving the question still doubtful, and only giving the party a chance before another jury. *Ib.*

4. The Court must be satisfied that injustice has been done between the parties before a new trial will be granted. *Ib.*

5. Neither will the Court grant a new trial when it is apparent it will not avail the petitioner. *Ib.*

6. Where a new trial was granted in an action under a rule, that a certain jail bond, which had been given in the case, should remain as security for any final judgement the plaintiffs might recover in the original action, and a new trial was accordingly had, in which the plaintiffs recovered a judgement for a less sum than in the former trial, which the defendant afterwards paid,—it was held that such payment would not bar a recovery in an action on the bond.—*Stillman et al. vs. Barney.* 331

7. It is a sufficient cause for granting a new trial, that one of the jurors, previous to the trial, had formed and expressed an opinion on the merits of the case, in favor of the party who succeeded.—*French vs. Smith et al.* 363

8. A new trial will not be granted to a party plaintiff on account of the court's having improperly rejected testimony, when it is evident that, in case of a recovery, judgement must be arrested for the insufficiency of the declaration.—*Beardsley vs. Knight.* 471

#### NONSUIT.

A plaintiff will in no case be compelled, for the insufficiency of his evidence, to become nonsuited on trial.—*French vs. Smith et al.* 363

#### NOTICE.

Reasonable notice must be given to a party to produce a paper in his possession, or he cannot be compelled to produce it. Notice given at the trial of a cause is not sufficient.—*Durkee vs. Leland.* 612

See ERROR, 1, 2.

TOWNS, 2.

POOR DEBTORS, 1, 2.

ORDER OF REMOVAL, 3.





OFF-SET.

See SET-OFF.

ORDER OF REMOVAL.

1. Where an order of removal is made agreeably to the acts respecting a *legal settlement and providing for the poor*, the copy, which is required by the 5th section of the act of 1817, to be left with the overseers of the poor of the town to which the pauper is ordered to be removed, must correspond with the original in every substantial part. If there is an omission in the copy which would be fatal, if it were in the original proceeding, the statute is not complied with.—*Barnet vs. Concord.* 564

2. The removal of a pauper cannot legally be made before the day fixed upon by the justices for the pauper to remove himself. *Ib.*

3. To make an order of removal of a pauper conclusive between the towns who are parties thereto, and also as to all others, it must be perfected by giving the notice required by the statute, that is, by leaving a true and attested copy within thirty days after the order of removal is made; and this notice cannot be waived, so as to affect the settlement of the pauper, by any agreement of the overseers of the town entitled to receive it.—*Barre vs. Morristown.* 575

P

PAROL EVIDENCE.

S. G., being entitled by devise to a share in the real and personal estate of J. G., deceased, by his agent drew an order in favor of C. S. on the executor of J. G., directing him to pay over to C. S. all the right, title, property, interest or demand, which S. G., had under the will of J. G., except eighty dollars, and such as was under any legal incumbrance by attachment at the suit of R. And at the same time, (the order being immediately accepted,) said agent took the executor's note for the eighty dollars, and gave him a receipt in full of all the right, title, interest and demand of S. G. under the will, with the like exception on account of R's attachment. On ejectment brought by S. G., for a part of the real estate which had been severed to his share, in a division directed by the probate court among the devisees,—*Held*, that parol evidence was admissible to show that the premises sued for were not included in the settlement made with the executor.—*Giddings vs. Munson.* 308

See TROVER, 1.

SHERIFF, 5.

PARTITION OF REAL ESTATE.

This Court has not authority, under the act relating to partition of real estate, to assign the interest of one tenant in common to a co-tenant, nor to order the interest of one of several tenants in common to be sold; and a petition praying the Court to make such order, was dismissed with costs.—*Jewell vs. Nash et al.* 517

PARTNERSHIP.

In an action on book account between A and B, a claim in favor of A against B and C, as partners, is not proper to be taken into consideration by the auditor; and an objection to such a claim is not waived by not pleading in abatement.—*Loomis vs. Barrell.* 450

See SET OFF.

PART PAYMENT.

See CONSIDERATION, 1, 2, 3.

PAUPERS.

1. On the trial of an appeal from an order of removal of a pauper, a plea, that the pauper was seized and possessed of a messuage and lands and tenements in his own right, is not sufficient, without adding, that he had a freehold estate therein.—*Middletown vs. Pawlet.* 202

2. Where the overseers of the poor of the town of R, under the supposition that certain paupers residing in the town of M, had a legal settlement in B, supported the paupers for a time in M, and afterwards carried them to B, and supported them there for a long time,—it was held that these proceedings of the overseers of B, though legal evidence, were not conclusive that the paupers were legally settled in B.—*Barre vs. Morristown.* 574

3. And although in such case the overseers be empowered by the town to use their discretion with regard to the paupers, they cannot by such proceedings change the place of settlement of the paupers. *Ib.*

See FEME COVERT, 5.

ORDER OF REMOVAL.

PAYMENT.

Payments on a demand in suit, made pending the action, are of course to be deducted in making up judgement.—*Joy vs. Hull.* 455

See NEW TRIAL, 6.

ACCOUNT, 1.

PENCIL.

An endorsement of a promissory note, writ-

ten and signed with a pencil, is a valid endorsement, and the endorsee can maintain an action thereon against the maker.—*Closson vs. Stearns*. 11

### PLEADING.

1. If defendants plead performance, and conclude with a verification, the plaintiff ought either to demur or reply over. Merely adding the *similiter*, is not regular.—*Sherwin et al vs. Bliss*. 98

2. Any matter of defence, which goes only to a part of the plaintiff's claim, should be pleaded to so much only as it tends to meet.—*Treasurer vs. Holmes*. 110

3. A declaration, alleging, that the treasurer issued his extent in due form of law, bearing date, &c., is sufficient, without averring it to be signed by him; the objection not being taken by special demurrer.—*Treasurer vs. Weeks*. 215

4. A declaration on a receipt, taken by an officer for property, attached upon *mesne process*, should contain sufficient averments to show, that the lien, created by the attachment, has been preserved; especially when the original debtor is defendant.—*Cooper vs Cree et al*. 289

5. In an action on jail bond, the defendant pleaded *nul tiel record* of the judgement on which the bond was predicated, and the plaintiffs replied that defendant ought to be estopped from pleading said plea, because that, after the recovery of said judgement, the court awarded a new trial to the defendant on condition that he enter into a rule of record, that said bond should remain as security for any final judgement the plaintiffs might recover in the original action; that the defendant consented to said rule, and a new trial was had, in which the plaintiffs recovered judgement for a less sum than at the former trial. The defendant rejoined that he had paid and satisfied the judgement last recovered, and prayed judgement if he ought to be estopped from pleading *nul tiel record* of the first judgement.—It was held on special demurrer to this rejoinder, that there was no impropriety in concluding by praying judgement whether defendant ought not to be estopped; and that the replication, pleading the rule of court as an estoppel to the defendant's plea of *nul tiel record*, was sufficient.—*Stillman et al. vs. Barney*. 331

6. Matter which goes only in mitigation of damages need not be specially pleaded.—*Joy vs. Hull*. 455

See JAIL BOND, 1.

ERROR, 3.

CONSIDERATION, 2.

CONTRA FORMAM STATUTI.

DECLARATION.

FRAUDULENT CONVEYANCES, 1, 2, 3.

LEGISLATURE, 1.

SET OFF, 2.

### POOR DEBTORS.

1. It is the duty of the jail commissioners to give notice to the creditor before admitting the debtor to the oath prescribed for poor debtors, if there be an agent duly appointed on the execution; and if they omit to do so, their proceedings are irregular and void, and their certificate, on which it appears that no such notice was given, is no justification to the sheriff in permitting the debtor to depart.—*Dean vs. Lowry*. 481

2. If there be an attorney of record in a suit residing in the county where the debtor is confined, whose name is endorsed on the execution, he is an agent within the meaning of the act passed November 7th, 1820, relating to poor debtors, and must be served with notice of the prisoner's application to the commissioners to be admitted to the oath prescribed for poor debtors. *Ib.*

3. Where the surname, only, of an attorney was endorsed on the copy of an execution, it was held to be sufficient to apprise the debtor, commissioners and sheriff, that there was an attorney or agent on the execution, living in the county, agreeably to the provisions of the statute. *Ib.*

### POSSESSION.

1. When one enters on land claiming title thereto, his seizin extends to the whole parcel to which he claims title.—*Hapgood vs. Burt*. 155

2. When one not claiming any right to land enters thereon, he acquires no seizin but by the ouster of him who was seized; and to constitute such an ouster, the disseizor must have the actual exclusive occupation of the land, claiming to hold it adverse to him who was seized; or he must actually turn him out of possession. *Ib.*

3. When a disseizor claims to be seized by virtue of his entry and occupation, his seizin cannot extend further than his actual exclusive occupation. *Ib.*

4. To constitute a disseizin of the owner of uncultivated lands by the entry and occupancy of one not claiming title, the possession must be of such notoriety that the owner may be presumed to know there is a possession adverse to his title. *Ib.*

5. A seizin in fact of land under colour of title, is itself sufficient title for the plaintiff to recover against a defendant, who afterwards enters without colour of title.—*Warner's admr. vs. Page*. 291

6. If a tenant at will of land discontinues his possession, this should be treated as an abandonment to his landlord. *Ib.*

See DEED, 1.

LIMITATION OF ACTIONS, 9.

**PRESUMPTION.**

1. Demand of payment may as well be presumed, as any other fact, from lapse of time, and such dealings between the parties, as rendered it very improbable, that the claim could have been forgotten while it was worthy of any consideration.—*Staniford vs. Tuttle.* 82

2. The presumptive bar attaches in twenty years, where there is nothing proved to remove it; and especially where the transactions, proved, tend to aid the presumption. *Ib.*

See **REFEREES**, 1.

**LIMITATION OF ACTIONS**, 13.

**PRINCIPAL AND AGENT.**

See **ACCOUNT**, 1.

**PROBABLE CAUSE.**

See **MALICIOUS PROSECUTION**.

**PROBATE REGISTER.**

A letter of administration from a probate court signed by the register, or a certificate of administration attested by the register, is sufficient and proper evidence to show that the person named therein has been appointed administrator.—*Seymour's admr. vs. Beach.* 493

**PROMISSORY NOTES.**

1. The defendant, in a suit upon a note, may show the note to have been given without consideration.—*Rogers vs. Hough.* 172

2. If the plaintiff would urge, that the note on which the suit was brought was given to compromise a litigated claim, he must show it to have been so understood at the time of its execution. *Ib.*

3. Where the endorsee of a promissory note payable in specific property, demanded payment of the maker, at the time and place designated, without having the note with him, and the maker refused to pay it—it was held that for such laches of the endorsee the endorser was discharged.—*Eastman vs. Potter.* 313

4. When an action is brought by the assignee of a promissory note against the maker, it is the duty of the payee who has assigned the note, warranting it to be due, and has received notice of the suit, to furnish all the evidence in his power to enable the assignee to recover.—*Warner et al vs. McGary.* 507

5. In an action by the assignee of a note against the payee, who had assigned it warranting it to be due, the admissions of a person whose name appeared to the note, as the maker, were held to be inadmissible in evidence to prove the execution of the note by him, and thereby defeat a recovery by the plaintiff, on the ground that the supposed maker himself might be called on as a witness. *Ib.*

6. A promissory note given and received in payment of an antecedent account, is a bar to an action on that account, whether the note be paid or not.—*Hutchins et al. vs. Olcott,* 549.

7. If a person accept a note in satisfaction of his debt, he is paid by his own agreement, and cannot sue for his original debt, if there be no fraud or deception in giving the note. *Ib.*

8. Where one received a promissory note on settlement of an antecedent account, and wrote thereon, "Received payment by note," and delivered the account so receipted to the debtor, it was held that the receipt was *prima facie* evidence of the payment of the account. *Ib.*

See **PENCIL**.

**CONSIDERATION**, 5,

**LIMITATION OF ACTIONS**, 3, 4, 5, 10, 11.

**BOND**, 2.

**EVIDENCE**, 2.

**DISCHARGE**, 1, 2.

**LIEN**, 1, 2, 3.

**R**

**RECEIPTORS.**

1. In an action by an officer against the bailees or receiptors of property attached by him, it is not necessary, in order to prove the attachment, to produce the original writ; but the fact may be proved by other evidence; and the receipt, itself, if one has been taken, is the appropriate and proper evidence.—*Lowry vs. Cady.* 504

2. A receipt for property taken on an attachment is considered so far conclusive between the parties, that the person executing the same is not permitted to deny the attachment in a suit brought against him on the receipt. *Ib.*

See **ATTACHMENT**, 3, 9.

**PLEADING**, 4.

**RECOGNISANCE.**

In an action on a bond of recognisance, entered into at the time of suing out a writ of *audita querela*, conditioned for the redelivery of the execution debtor to the custody of the officer, and the payment of all intervening damages, and, in default thereof, the payment of the debt damages and costs,—it was held, that the recognisor, not having fulfilled the conditions of his recognisance, was liable for the whole debt and costs.—*Hubbell vs. Dodge.* 56

See **SHERIFF**, 4, 5.

**EXECUTION**, 7.

**RECORD.**

See **EXECUTION**, 5, 6.

**DEBT**, 1, 2.

## REFEREES.

Where referees, in an action on note against a surety, decided that the widow of the principal debtor could not be a witness to show that her husband had paid the note, and did not state in their report on what grounds they made their decision,—it was held that it should be presumed they had decided right.—*Hogaboom vs. Herrick.* 131

## RELEASE.

1. Where a party litigant executed a release to a witness to extinguish his interest in the suit, in order to render him competent, and the witness, at the same time, executed and delivered his note to the party in satisfaction of that interest, the validity of which was to depend on the event of the suit,—it was held, that there was a sufficient delivery of the release, though it did not actually come into the possession of the witness, but was immediately destroyed by the party on the witness being rejected.—*Walker vs. Ferrin.* 523

2. In such case, if the party be an infant, he is not bound by the discharge. *Ib.*

3. If the party be an adult, he will not be relieved from the effect of the discharge, on the ground that it is tainted with illegality and turpitude, he being a *particeps criminis.* *Ib.*

4. If a guardian *ad litem* join in the execution of such a discharge, it will still not be binding on the infant: the powers of such a guardian do not enable him to discharge the interest of a witness under such circumstances. *Ib.*

5. The mere circumstance, that a party executing such a discharge, is an infant, is not in all cases sufficient to avoid it. If it be executed by him on a *bona fide* and sufficient satisfaction of a debt due him, it is binding. *Ib.*

## RENTS AND PROFITS.

See EJECTMENT, 1.

## RETURN.

1. An officer's return of the levy of an execution on real estate is valid, if it is made according to the form given in the late *Judge Chipman's Reports.*—*Cleveland vs. Allen.* 176

2. But, if the return departs from the generality of expression, there used, and begins with more minute particulars, it must contain all the particulars made necessary by statute. *Ib.*

3. A defective description of some lots in the levy, does not vitiate the levy with regard to such lots as are fully described; although the appraisal is only mentioned in the gross sum, at which all the lots are appraised, unless the

question is raised upon some motion to set aside the levy, and leave the execution unsatisfied. *Ib.*

4. Where an officer levying an execution on land did not state in his return that the appraisers were resident *in the town* where the land was situated,—it was held that the levy was not thereby void, the officer having pursued a form which had been long followed and extensively practiced upon.—*Seymour's admr. vs. Beach.* 493

5. Where a constable in his return on a warning-out process stated that he had served the precept by leaving a true and attested copy of the same at the last and usual place of abode of the person named in the warning, "with a person of discretion residing therein," with his return thereon endorsed,—it was held to be bad, because the name of the person with whom the copy was left was not mentioned, and because it was not stated that such person was one of sufficient discretion.—*Barnet vs. Concord.* 564

6. Where a constable in his return on a warning-out process stated he had served the same by leaving a true and attested copy at the dwelling-house of the person named in the process, without stating with whom, or in what situation, he left the copy,—it was held that the warning was insufficient.—*Barre vs. Morristown.* 574

7. The statute does not require that an officer shall affix a seal to a return made on an execution levied on land.—*Eastman vs. Curtis.* 616

8. Nor that a certificate of the appraisal should accompany the return. *Ib.*

9. The return of an officer on an execution, as to the facts therein stated, is conclusive on the parties and all claiming under them. *Ib.*

See EXECUTION, 1, 4, 11, 12, 13, 14, 15.

## SERVICE OF PROCESS.

## REVIEW.

1. The statute of 1811, allowing a review in certain appealed causes, is not repealed by the statute of 1826, which purports to take away the right of review in appealed causes.—*Bloss vs. Kitridge.* 272

2. The defendant's filing in offset, in an appealed action, matters of which the county court might take original jurisdiction, renders the action open to a review in the county court. *Ib.*

## RULE OF COURT.

See NEW TRIAL, 6.

## S

## SALE.

See CONTRACT, 1.

VENDOR & VENDEE.  
ACCOUNTABILITY.

**SCHOOL DISTRICT TAX.**

1. The collector of a school-district tax is liable in trespass for seizing property by virtue of his warrant and rate-bill, if the district have no power to grant the tax, or if there be any illegality in voting it.—*Waters vs. Daines.* 601

2. And although in such case the rate-bill and warrant are regular on their face, the collector is not justified. *Ib.*

3. The inhabitants of a school district cannot vote a tax on a list which is not to be completed until after thirty days from voting the tax. *Ib.*

4. Therefore, where a school district voted a tax in May on a list which could not be completed till December following, and, consequently, the tax could not be assessed within thirty days after voting the tax, as required by the statute, it was held to be illegal, and that all the subsequent proceedings had to enforce the collection of the tax were also illegal. *Ib.*

5. A school-tax is not necessarily void because it is not assessed within thirty days after it is voted. *Ib.*

**SCIRE FACIAS.**

See **SHERIFF**, 1.

**TREASURER'S EXTENT**, 5.

**SEAL.**

1. It is a question of law for the court to decide what constitutes a seal; but it is for the jury to determine whether that, which the court adjudges to be a seal, has been affixed to an instrument.—*Beardsley vs. Knight.* 471

2. A seal, such as is required to a deed conveying land, must be of wax or wafer, or some adhesive substance which is capable of receiving an impression. *Ib.*

See **RETURN**, 7.

**SEIZIN.**

See **POSSESSION**.

**SERVICE OF PROCESS.**

1. An officer's return upon a *warning-out process*, that he made service in one of two ways, without stating which, one of them being good, and the other bad, is a deficient return.—*Marshfield vs. Montpelier.* 284

2. When several persons are named in one precept, and the officer returns, that he served it regularly on some of them, stating the manner particularly, and then, as to the service upon others, he says, he served it on them, *as above stated*; by its incorporating what is referred to, and that being correct, it is a good return. *Ib.*

3. Where a sheriff attaches property, and returns, that he left a copy of the writ at the last and usual place of abode of the defendant, without stating in what situation such copy was left, the service is defective, and the suit abatable; but the attachment is valid, as against subsequent creditors, and trespass may be sustained by virtue of the lien.—*Newton vs. Adams et al.* 437

See **DEFENDANT**, 1, 2, 3, 4.

**FEME COVERT**, 5.

**RETURN**, 5. 6.

**SET-OFF.**

1. In an action brought by one as surviving partner, to recover for a debt due to the firm, the defendant may plead in offset any demand he has against the plaintiff individually, unless there be some equitable interest in another person which a court of law can protect.—*Meador vs. Scott.* 26

2. In an action of *assumpsit* on promissory note, commenced before a justice of the peace, and appealed to the county court, a plea in offset in two counts, one in *assumpsit* on simple contract, and the other in debt on judgement, was held, on demurrer, to be sufficient.—*Burton vs. Brush.* 467

See **REVIEW**, 2.

**SETTLEMENT.**

See **PAUPERS**.

**SHERIFF.**

1. It is no defence to *scire facias* on a judgement, that the plaintiff has received the amount from the officer, who had failed to collect of the debtor, when the debtor has never paid the debt, and the creditor permits his name to be used for the benefit of the officer.—*Treasurer vs. Holmes.* 110

2. When an officer neglects to make an entry on an execution, of the true day, month and year, when he received it, and the same becomes important to support his lien upon the property, for which a suit is brought, the court will not permit such officer to make the entry *nunc pro tunc*, so as to affect the suit then pending.—*Fletcher vs. Pratt et al.* 182

3. But such officer may support his lien by such parol proof, as would show the attaching creditor's lien upon the property kept good, as against the officer, who made the attachment. *Ib.*

4. The act requiring that a sheriff, before entering upon the duties of his office, shall become bound, by way of recognisance, with surety, before the chief judge of the county court, or, (in case of his absence or death,) before one of the assistant judges, is constitutional and valid, though the constitution provide,

that said recognisance shall be taken by the chief judge only.—*Treasurer vs. Kelsey*. 371

5. In a case where the bond was taken by an assistant judge, parol evidence was held to be admissible to prove the absence or death of the chief judge. *Ib.*

6. Sheriff's deputies are recognised by the statute as distinct officers; and their doings should be certified in their own names, and not in the name of the sheriff.—*Eastman vs. Curtis*. 616

See ATTACHMENT.

ESCAPE.

TREASURER'S EXTENT.

MONEY.

SERVICE OF PROCESS.

POOR DEBTS.

### SLANDER.

Where in an action for charging the plaintiff with stealing certain sheep, the defendant, for the purpose of mitigating the damages, gave in evidence the record in an action of trespass brought by the plaintiff against the defendant for taking away said sheep, in which judgment had been rendered in favor of the defendant; it was held, that the plaintiff for the purpose of showing malice in the defendant, and to enhance the damages, might prove, by circumstantial evidence, that, at the time of accusing the plaintiff as complained of, the defendant knew the accusation to be false.—*Bullock vs. Cloyes*. 304

### STATE.

See LIMITATION OF ACTIONS, 6.

### STATE TREASURER.

See TREASURER'S EXTENT.

### STATUTE.

See REVIEW, 1.

CONSTITUTIONAL LAW.

### SUBMISSION TO ARBITRATORS.

See CONSIDERATION, 4.

ARBITRATION, 1.

### SURETY.

1. Where the surety in a note requested the creditor to sue the principal, and informed him he did not wish to stand as surety any longer, and the creditor delayed to sue till the principal had become insolvent,—held, that the surety was not thereby discharged.—*Hogaboom vs. Herrick*. 131

2. A naked agreement between a creditor and one who is holden to him as surety, that the surety should be discharged, and no longer

holden for the debt, is without consideration and void: *Ib.*

3. But if such an agreement so quiet the surety that he thereby neglects taking measures to secure himself till the principal has become insolvent, *quære*, whether he is not discharged from further liability. *Ib.*

See CONSIDERATION, 4.

DISCHARGE, 2.

## T

### TENANTS IN COMMON.

1. Where there are three or more tenants in common of land, an action of account at law cannot be maintained by one against another. In such case, if one seek to recover for rents and profits, he must resort to a court of equity.—*Wiswell vs. Wilkins*. 137

2. If the interest of one such tenant in common is separate, and the interest of the others joint, there would be but two parties, and the action of account would lie. *Ib.*

3. If a chattel is owned by two as tenants in common, and a creditor of one attaches such chattel, he must attach only the undivided half belonging to his debtor.—*Ladd vs. Hill*. 164

See PARTITION OF REAL ESTATE.

### TOWNS.

1. *Assumpsit* lies by a town, erecting a bridge under an order of court made on their petition, against any town, assessed by such order, in a portion of the expenses of erecting such bridge.—*Brooklyn vs. Westminster*. 224

2. Notice of the expenditure in erecting such bridge should be given, not to the town clerk, but to the select-men, and payment be demanded of them. *Ib.*

3. The order of the county court, for erecting a bridge and apportioning the expense upon several towns, is conclusive upon the towns, cited before them on the petition, if the case is within their jurisdiction and their order within the powers given them by statute. *Ib.*

4. For the purpose of such jurisdiction, a river is to be considered as running between two towns, both when it is literally so, one bounding on each side, and when both are bounded together upon one side, and when neither can erect the bridge without extending it into the other town. *Ib.*

### TOWN CLERK.

1. Where the official signature of a town-clerk was subscribed to that part of the certificate on the back of a deed, which related to the receipt of the deed into his office for record, but not to the following part which certified



that the same was recorded in a particular book and page—the whole certificate being evidently in the hand writing of the town clerk,—such deed was held to be admissible in evidence.—*Johnson's admr. vs. McGuire.* 327

2. Such town-clerk may add his name to such certificate at any time. *Ib.*

#### TREASURER'S EXTENT.

1. when a sheriff has neglected to execute two extents against different constables, the state treasurer may issue one extent against such sheriff for both neglects.—*Treasurer vs. Weeks.* 215

2. When a sheriff, who has neglected to execute an extent, is out of office, the extent against him may be directed to, and served by, the sheriff, who is in office at the time, and need not be directed to the high bailiff. *Ib.*

3. The neglect of a sheriff in not serving and returning an extent, issued by the state treasurer against a delinquent constable, is a neglect happening in the county where the treasurer resides, though it be a different county from that in which such sheriff officiates.—*Treasurer vs. Kelsey.* 371

4. Though the state treasurer have a right by statute to issue an extent against a sheriff for his neglect in levying and returning an extent against a delinquent constable, he is not thereby deprived of his remedy by action at law for the same neglect. *Ib.*

5. If the treasurer, instead of issuing an extent against such delinquent sheriff, bring an action against him for such neglect, and recover judgement therefor, and the sheriff be committed to jail on the execution,—such sheriff's bail are liable in *scire facias* for the amount of the judgement, and cannot plead in bar thereof the delay or neglect of the treasurer to issue an extent against such sheriff. *Ib.*

6. Neither can the sheriff's bail, in such case, plead in bar that the treasurer's extent against the delinquent constable was not seasonably issued. *Ib.*

See PLEADING, 3.

#### TRESPASS.

1. Under the plea of *not guilty* in *trespass*, and notice of a former recovery by the defendant in a suit for the same cause of action, the proof must be such as would support a good plea in bar, if pleaded specially.—*Clark vs. Harrington et al.* 69

2. The action of *trespass* for the actual taking and carrying away of personal property is not barred by the defendant's having recovered judgement in a suit brought by the same plaintiff for the same property, commenced before the actual removal of the property, the first attachment being upon a writ against a third person. *Ib.*

3. Several actions will not lie for different parcels of goods taken at the same time. *Ib.*

See SCHOOL DISTRICT TAX, 1, 2.

ASSAULT AND BATTERY.

#### TROVER.

1. Parol evidence is admissible in *trover* against a third person, to show that an execution was delivered to the officer who served the attachment, within thirty days from the rendition of the judgement.—*Lowrey vs. Walker.* 76

2. Such third person cannot be permitted to question the regularity of the judgement of a justice of the peace, through want of continuances, or the giving of bonds as the law requires, while the execution is not set aside by regular process. *Ib.*

3. When an officer attaches personal property, such as hay, and leaves copies with the town clerk as the statute provides, the attachment gives him sufficient title and possession to maintain *trover* against one who has converted the same property. *Ib.*

4. The defendant, in such case, is only liable for the property he has actually converted, or over which he had some control, when he forbade the officer's selling it. *Ib.*

See MORTGAGE, 2.

#### TRUSTEE ACTION.

1. This Court cannot reverse the decision of the county court in trustee actions, upon matters arising between the creditor and trustee, unless the facts are all placed upon the record in the county court, by a bill of exceptions, or otherwise.—*Haseltine vs. Page, trustee.* 49

2. It makes no difference in this respect, whether the action comes up by appeal, or by exceptions to the decision of the county court. *Ib.*

3. Exceptions should be drawn and signed by the judges, stating, that they found the facts as stated in the disclosure, or found such to be the facts, stating them, and, upon such facts, decide in favor of such a party. *Ib.*

4. The Supreme Court are no more judges of the weight of evidence in such actions than they are upon any writ of error. *Ib.*

5. A trustee of an absconding debtor will not be protected by a previous judgement against him in that capacity, when said judgement is to be satisfied in specific property, and cannot be enforced till a future time, and the monies or credits in the trustee's hands are due immediately. *Ib.*

6. Neither will a trustee be protected by having promised to pay the amount of his indebtedness to the creditors of the absconded debtor, if such promise be void by the statute of frauds. *Ib.*



## V

## VARIANCE.

See CONSIDERATION, 4.

## VENDOR AND VENDEE.

1. Where goods were sold, which were not in the possession of the vendor at the time, but in the possession of a third person, who was notified, and consented to keep them for the vendee, it was held that the sale was not fraudulent, though there was no actual change of possession.—*Harding vs. Janes.* 462

2. Where the vendor, in such case, had authority from the vendee to sell or to let the goods, and he accordingly sold a part, and let the residue, and received payment therefor, it was holden that such acts of the vendor were not evidence of fraud. *Ib.*

3. Where a contract for the sale of a cow was made on condition that if the vendee paid for her the price stipulated, the cow was to be his, otherwise she was to remain the property of the vendor; and the vendee took the cow, and used her as his own for three or four years, and in the mean time paid a part of the purchase money, which the vendor accepted; but the vendee neglecting to pay the balance when requested, the vendor directed his son to take the cow away, which he accordingly did.—It was held in an action of trespass, brought by the vendee against the son of the vendor, for seizing and driving away the cow, that the title of the property was not vested in the plaintiff by the sale.—*West vs. Bolton.* 558

4. In such case the vendor is a competent witness for the defendant to prove the contract of sale, even without a release, on the ground that he is a co-trespasser with the defendant. *Ib.*

See SALE.

ACCOUNTABILITY.

## VENDUE DEED.

1. When one claims title to land under the vendue-deed of a collector of taxes, he must prove that the several essential things required by law to be done previous to the sale, have been performed accordingly.—*Hall vs. Collins.* 316

2. The recitals in a collector's deed are not evidence of what has been done by other persons previous to its execution. *Ib.*

3. *Quære*, whether such recitals are evidence of the doings of the collector himself. *Ib.*

## VOLUNTARY CONVEYANCE.

1. Where one in prosperous circumstances,

☐ The reader will please to expunge the title "*Constitution*," in the foregoing Index, and insert instead thereof *Consideration*;—there being in reality no such title as *Constitution*.

and not much embarrassed with debts in consideration of natural love and affection made a voluntary conveyance to his daughter of a portion of his estate, leaving amply sufficient to pay all he owed,—it was held that such conveyance was good and valid against a subsequent mortgage given to secure a debt existing previous to such voluntary conveyance.—*Bracket et ux. vs. Waite et al.* 389

2. If a voluntary conveyance be good and valid in law at the time it is made, it will not be rendered fraudulent by subsequent events by which the grantor becomes insolvent. *Ib.*

## VOTES.

Under the constitution of this state, printed votes may be legally received for Governor, Lieutenant Governor, Treasurer and Councilors, who are to be chosen annually by the freemen.—*Temple vs. Mead.* 535

## W

## WARRANTY.

See EVIDENCE, 2.

## WITNESS.

1. One who is supposed to have conveyed away his property with a view to defraud his creditors, is a competent witness for the purchaser to show that the conveyance was not fraudulent.—*Edgell vs. Lowell et al.* 405

2. In an action of ejectment, by one who claims under the levy of an execution, against one who holds under a deed from the execution debtor, made prior to the levy, such debtor cannot, by reason of interest, be a witness for the plaintiff to prove that the conveyance to the defendant was fraudulent.—*Seymour's admr. vs. Beach.* 493

3. But the plaintiff, though he sues as administrator of the levying creditor, may render the witness competent, by discharging him from any liability on the judgement, which might arise in case the plaintiff failed to recover. *Ib.*

4. And a witness under such circumstances is not disqualified, on the ground of public policy, from impeaching the validity of his conveyance. *Ib.*

See AGENT, 1.

EVIDENCE, 1.

PROMISSORY NOTE, 5.

RELEASE, 1, 2, 3, 4, 5.

VENDOR & VENDEE, 4.

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